



**UNIVERSITA' LUISS GUIDO CARLI**  
**FACULTY OF LAW**

**PHD THESIS ON**  
**“INTERNAL AND INTERNATIONAL ARBITRATION LAW”**  
**XXI CYCLE**

**THE 1996 UK ARBITRATION ACT**  
**AND THE UNCITRAL MODEL LAW**  
**- A CONTEMPORARY ANALYSIS -**

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“...[I]t was said that the existence of these powers reflected an attitude of suspicion and hostility on the part of the English legal establishment in general and on the part of the judiciary in particular towards a rival system of adjudication”.<sup>1</sup>

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<sup>1</sup> Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration* (HMSO, 1989), Chaired by The Rt Hon Lord Justice Mustill, at 5.

## **Abstract**

In the first chapter this thesis traces the development of arbitration from its early foundations to the well-established dispute resolution mechanism that it has become today. In particular, emphasis is placed on the tumultuous relationship that has existed between the judiciary and the autonomy of arbitration and, moreover, attention is drawn to the consequences of this ‘suspicious attitude’ on the part of the courts. Furthermore, the extent to which arbitration has become an alternative to litigation, and the reasons for such, is assessed in light of an examination of the inherent attributes of arbitration in solving commercial disputes in an international context.

The locus of the Thesis turns to arbitration in the United Kingdom in Chapter 2. First, the statutory history of arbitration is charted and the need for change that prompted the Arbitration Act 1996 identified. Following this, the 1989 Report of the Departmental Advisory Committee that laid the groundwork for the radical change which the new Act would effect is considered. The object of the Thesis in this part is to make a novel contribution to academic discourse by examining the Committee’s reasoning for choosing not to adopt the UNCITRAL Model Law and, particularly, whether these reasons are still applicable two decades on. Finally, this chapter provides an overview of the Arbitration Act 1996. The guiding

philosophy, structure and primary tenets of the Statute are introduced and discussed.

In the third chapter, an objective and comparative analysis is conducted in respect of certain provisions of the Arbitration Act 1996 and the UNCITRAL Model Law. Four key areas have been identified as offering the most substantial differences between the two legislative frameworks and are the subject of acute examination, namely: arbitrability, separability, competence of the arbitral tribunal to rule on its own jurisdiction and judicial intervention at all stages in arbitral proceedings. Through the course of this comparison, a well-defined methodology is followed. First, the respective provision is introduced under the Arbitration Act and the UNCITRAL Model Law. Secondly, an objective analysis is discreetly conducted of each provision. Next, the critical comparative analysis between the 1996 Act provision and the UNCITRAL Model Law provision is undertaken. This is subsequently followed by a conclusion of the findings.

Chapter 4 contains an empirical inquiry as to recent trends in international arbitration. Reference is made to a number of leading studies to highlight, in particular, those features of dispute settlement which concerned parties find attractive. Of the empirical data cited, an analysis in terms of the 'Thesis' parameters is given. Furthermore, a specific case study of a

jurisdiction currently in the process of adopting the Model Law – Ireland – forms the final part of this chapter.

The Conclusion of the Thesis draws these various strands together in attempt to decipher whether, in order to preserve London as a leading arbitral hub, England and Wales should adopt the UNCITRAL Model Law as the legislative regime in place of the Arbitration Act 1996.



## **Keywords**

Anti-Suit Injunction

Appeal

Arbitrability

Arbitral Award

Arbitration

Arbitration Agreement

Arbitration Seat

Challenge

Common Law

Competence

DAC Report

Enforcement

Execution

Illegality

Judicial Intervention

Judicial Review

Jurisdiction

*Kompetenz-Kompetenz*

Litigation

Mandatory / Non-Mandatory

Party Autonomy

Point of Law

Procedural Fairness

Recognition

Seperability  
Serious Irregularity  
Stay of proceedings  
Substantial Injustice  
UNCITRAL Model Law



## List of Abbreviations

AAA	American Arbitration Association
AC	Appeals Cases
ACTSC	Australian Capital Territory Supreme Court
ADR	Alternative Dispute Resolution
All ER	All England Law Reports
ALL ER Comm	All England Law Reports Commercial Division
ASP	Act of the Scottish Parliament
BLR	Building Law Reports
CIARB	Chartered Institute of Arbitrators in England
CIETAC	China International Economic and Trade Arbitration Commission
CPIL	Code on Private International Law
DAC	Departmental Advisory Committee
EC	European Community
ECJ	European Court of Justice
Ed	Edition
ed./eds.	Editors
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court

HKIAC	Hong Kong International Arbitration Centre
HMSO	Her Majesty's Stationary Office
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICR	Industrial Cases Reports
ICSID	International Centre for the Settlement of Investment Disputes
IRLR	Industrial Relations Reports
JCAA	Japan Commercial Arbitration Association
KB	Kings Bench Division Law Reports
LCIA	London Court of International Arbitration
Lloyd's Rep	Lloyd's Law Reports
MR	Master of the Rolls
NSWSC	New South Wales Supreme Court
OJ	Official Journal
OLDP	Office of Legislative Drafting and Publishing
QB	Queen's Bench Division Law Reports
SCC	Stockholm Chamber of Commerce

SIAC	Singapore International Arbitration Centre
UK	United Kingdom
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
WLR	Weekly Law Reports
Ybk Comm Arbn	Yearbook of Commercial Arbitration

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## 1 ARBITRATION AS AN ALTERNATIVE METHOD OF SETTLING DISPUTE

It is incontrovertible that arbitration has become a significant alternative to litigation in the resolution of commercial disputes. A former President of the Chartered Institute of Arbitrators in England has perceived that “[t]he growth of arbitration, as an alternative to litigation, reflects its ability to escape from the limitations of the courts”.<sup>2</sup> Indeed, the traditional arguments made in favour of arbitration are well known. Its attractiveness lies in the cost and time that can be saved as well as the ability to have disputes decided on familiar rules and to appoint an arbitrator with expertise of the industry sector. In the arena of international commerce, however, the advantages of arbitration are brought into sharper focus where businesses, faced with litigation outside of their home jurisdiction, may have to engage in foreign court proceedings which can be time-consuming, complicated and expensive. Further, a decision rendered in a foreign court has the potential to be unenforceable. Contrast this with the international recognition generally accorded to arbitral awards, in addition to well-defined procedure, and it is clear to see why businesses choose arbitration to settle disputes.

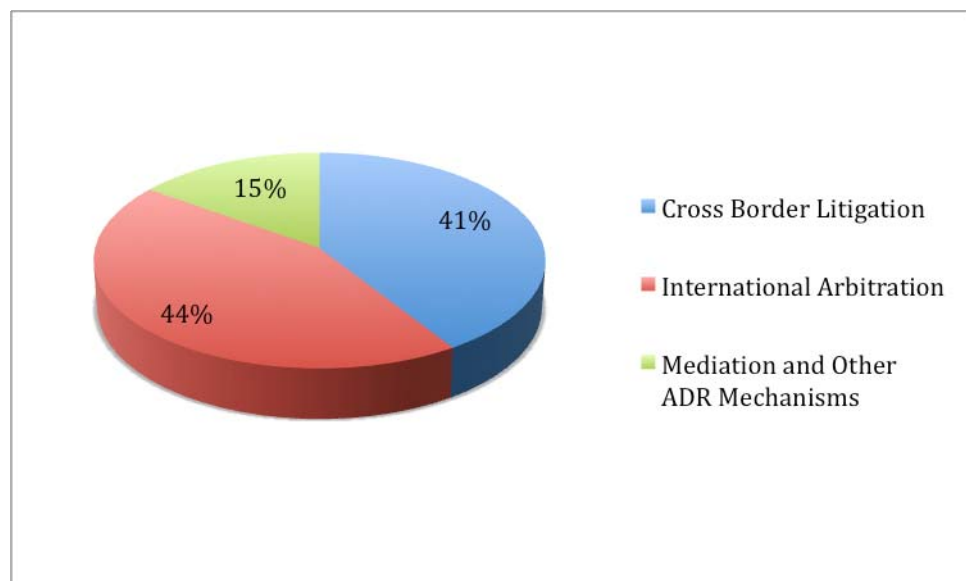
A 2008 International Arbitration Study conducted by the Queen Mary University of London School of International Arbitration

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<sup>2</sup> The Right Hon. Sir Michael Kerr in Ronald Bernstein ed., *Handbook of Arbitration Practice* (Sweet and Maxwell, 1987), at 3.

indicated that 88% of the participating corporations preferred to use international arbitration as the method of settling their cross border disputes. This Study and the preceding 2006 International Arbitration Study found that the major advantages of arbitration included the flexibility of procedure, enforceability of awards, privacy in the arbitral process, depth of expertise of arbitrators and the opportunity accorded to the parties to select their own arbitrators.<sup>3</sup>

The following Chart illustrates the dispute resolution mechanisms that respondents in the Survey indicated they had experienced.



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<sup>3</sup> Queen Mary University of London School of International Arbitration, *International Arbitration Study: Corporate Attitudes and Practices 2008*, sponsored by Price Waterhouse Coopers, available at: [www.pwc.co.uk/eng/publications/International\\_arbitration.html](http://www.pwc.co.uk/eng/publications/International_arbitration.html).

Indeed, much empirical data points to the conclusion that arbitration has achieved a more exclusive status than simply an alternative to litigation in international commerce. Rather, as Alan Redfern and Martin Hunter note, “[i]nternational arbitration has become the established method of determining international commercial disputes”.<sup>4</sup> In addition, leading arbitration law scholars Julian Lew, Loukas Mistelis and Stefan Kröll have asserted that “[f]or centuries arbitration has been accepted by the commercial world as a preferred or at least an appropriate system for dispute resolution”.<sup>5</sup> Adopting a more sceptical account, Jan Paulsson argues that arbitration is often the only option for parties wishing to settle disputes in an international context as there is no other realistic choice. “[International arbitration] prevails by default; there exists no neutral international court for private-law disputes”.<sup>6</sup> The object of this introductory chapter is to assess the theoretical foundations and to chart the growth of international commercial arbitration in an attempt, particularly, to identify the reasons for its present-day popularity.

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<sup>4</sup> Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration*, (4<sup>th</sup> Edition, Sweet and Maxwell, 2004), at 1.

<sup>5</sup> Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003), at 18.

<sup>6</sup> Jan Paulsson, “International Commercial Arbitration”, *Bernstein’s Handbook of Arbitration and Dispute Resolution Practice* in John Tackaberry, Arthur Marriot QC and Ronald Bernstein eds., (4<sup>th</sup> ed, Sweet and Maxwell, 2003), at 335.

## 1.1 Arbitration – Theoretical Foundations

Arbitration is a mechanism for settling disputes which provides a final, binding and enforceable result.<sup>7</sup> A unique feature of this mechanism is that parties generally agree to participate in arbitral proceedings prior to the dispute arising. Furthermore, resolution of the dispute is always by way of an impartial third-party finding which may be appealed to a court of law. There is no single definition of arbitration but the Arbitration Act 1996 in the United Kingdom endeavours to describe the object of the process, namely “*to obtain the fair resolution of disputes, by an impartial tribunal, without unnecessary delay or expense*”.<sup>8</sup>

From here we can build up a picture of the defining characteristics which are important to bear in mind as we move through this inquiry: a mechanism for resolving disputes, impartial tribunal, avoidance of unnecessary delay or expense.

Many authors, however, point out that although the latter is commonly perceived to be the most significant distinguishing trait of arbitration as compared to litigation, it is not necessarily the case that arbitration is a quicker or cheaper alternative to litigation in present day commercial disputes.<sup>9</sup> Christopher

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<sup>7</sup> See Ericus Stewart, *Arbitration: Commentary and Sources* (First law, 2003), at 1.

<sup>8</sup> General Principles of the Arbitration Act 1996, section 1(a).

<sup>9</sup> See Christian Buhring-Uhle, “A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration”, in *Towards a Science of Arbitration: Collected Empirical Research*, Christopher Drahozal and Richard Naimark eds. (Kluwer Law International, 2005), at 38.



Drahozal and Richard Naimark posit that “*whether arbitration is faster or cheaper than litigation is a perennial question, and one of obvious importance to the parties’ choice of dispute resolution forum*”.<sup>10</sup> In an empirical study appended to the insightful text *Towards a Science of Arbitration: Collected Empirical Research*, Christine Buhring-Uhle concludes “*as a general result it could be said that, on balance, arbitration was seen as faster but not less expensive than litigation*”.<sup>11</sup>

One generally accepted characteristic associated with arbitration, however, which is not mentioned in the 1996 Act description is the role of ‘party autonomy’. In other words, the parties should be free to agree how their disputes are resolved, subject to safeguards necessary in the public interest.

It is important to note at this stage that arbitration is consensual, parties to an arbitration agreement intend for their disputes to be resolved in this manner rather than litigation. This independent expression of intention is referred to as ‘party autonomy’. Usually, arbitration law attempts to accord immense significance

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<sup>10</sup> Christopher Drahozal and Richard Naimark, “Commentary”, in *Towards a Science of Arbitration: Collected Empirical Research*, Christopher Drahozal and Richard Naimark eds. (Kluwer Law International, 2005), at 20.

<sup>11</sup> The same finding was found by a study conducted by Kritzer & Anderson on American domestic arbitration which concluded that AAA arbitration was faster but not necessarily less expensive than litigation, see Kritzer & Anderson, “The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts”, 8 *Justice Systems Journal* 6 (1983) cited in Christian Buhring-Uhle, “A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration”, in *Towards a Science of Arbitration: Collected Empirical Research*, Christopher Drahozal and Richard Naimark eds. (Kluwer Law International, 2005), at 38.

to party autonomy. As Ercus Stewart points out “[a]rbitration is a method of dispute resolution. It is not ‘litigation without wigs’, nor is it supposed to be litigation by another name”.<sup>12</sup> Party autonomy, it is submitted, is the defining attribute of arbitration, especially when one considers that its origins lay in the concept of resolving disputes by and between merchants. It is perhaps surprising, therefore, that it does not feature in the 1996 Act’s initial purview of the arbitration mechanism.

Some other characteristics of arbitration, which may vary from jurisdiction to jurisdiction, should also be identified. Arbitrators are often chosen by the parties upon mutual agreement and need not possess any particular qualifications. However, it is in the interests of an efficient and final solution that the arbitrator has a knowledge of the industry and the applicable law. There is generally a right afforded to the parties to appeal where either is not satisfied with the conduct of the arbitral proceedings. In addition to this interference by the courts, they are also permitted to intervene in arbitral proceedings at earlier stages, even before and during the arbitration itself.

These comprise the key tenets that form the skeleton of arbitral procedure and it is now pertinent to see how these attributes have enabled arbitration to gain its pre-eminent reputation in the field of international dispute settlement.

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<sup>12</sup> Ercus Stewart, *Arbitration: Commentary and Sources* (First law, 2003), at 2.

## 1.2 The Growth of International Arbitration

Arbitration is not, contrary to popular belief, a recent phenomenon. It has in fact “*existed for as long as the common law*” in England.<sup>13</sup> As courts struggled to develop their jurisdiction at a rate consistent with the number and complexity of trade disputes in the rapidly growing sphere of international commerce, arbitration quickly became the dispute resolution mechanism of choice. Merchants insisted that it was far more effective if they themselves dealt with mercantile problems and they developed their own rules and procedures for resolving disputes. By the mid-seventeenth century in England, Karen and Andrew Tweeddale highlight that the power of the arbitral tribunal was, in some ways, greater than the courts.<sup>14</sup> This prompted the judicature, wishing to keep all matters legal within their jurisdiction, to assume a supervisory role over arbitration and began to intervene in the exercise of the arbitral tribunal.<sup>15</sup>

In the late 19th century, international arbitration began to gather significant momentum but its governance remained the preserve of national law. With no international regulation of arbitration, the enforcement of awards was handled differently in different countries. This added yet a further complexity to international

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<sup>13</sup> Karen Tweeddale and Andrew Tweeddale, *A Practical Approach to Arbitration Law* (Blackstone Press, 1999), at 1.

<sup>14</sup> *Ibid.*

<sup>15</sup> See Lord Parker of Waddington, *The History and Development of Commercial Arbitration* (Jerusalem: Magnes Press, 1959), at 13.

arbitral procedure, especially when compounded with the multifarious legal regimes with which parties to an international arbitration had to grapple.

Early efforts to regulate international arbitration are evident in the Hague Conventions of 1899 and 1907 promoting the “Pacific Settlement of Disputes” which established the Permanent Court of Arbitration. Over the decades that followed, the business community set up the International Chamber of Commerce (hereinafter “ICC”) and the Court of Arbitration, with the inception of the former occurring in 1919 and the latter in 1923. These institutions helped to drive the adoption of the Geneva Conventions on Arbitration and the Execution of Foreign Awards in 1923<sup>16</sup> and 1927<sup>17</sup> respectively, which have since been superseded by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.<sup>18</sup> These all represent early attempts at harmonising arbitration law on an international scale.

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<sup>16</sup> Geneva Protocol on Arbitration Clauses, (Geneva, 24 September 1923).

<sup>17</sup> Geneva Convention on the Execution of Foreign arbitral awards (Geneva, 26 September 1927).

<sup>18</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). This Convention was the result of unsatisfactory results of the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In this framework, the International Chamber of Commerce (ICC) played a very key role in that it took the initiative to replace the Geneva treaties and issued a preliminary draft convention in 1953. Working on the ICC’s initiative, in 1955, the United Nations Economic and Social Council drafted an amended version of the convention which was discussed in May-June 1958 and led to the establishment of the New York Convention.

In an effort to break down the remaining barriers to international trade as a result of the disparities in national trade laws, the United Nations General Assembly established the United Nations Commission on International Trade Law (hereinafter “UNCITRAL”) in 1966. The mandate given to the UNCITRAL in this task was to “*further the progressive harmonisation and unification of the law of international trade*”.<sup>19</sup> The Commission is now the principal legal body of the United Nations system as regards international trade law and is composed of sixty member States elected by the General Assembly. Its principal contributions to international arbitration law include the UNCITRAL Arbitration Rules and the UNCITRAL Model Law. The former set of rules was adopted by the General Assembly in 1976 and according to Jan Paulsson “*were prepared with the input of lawyers from round the world, and therefore thought to be more acceptable to parties from developing countries than the rules of institutions perceived as inspired by the Western capitalist ethos*”.<sup>20</sup> Latterly, in 1985, the UNCITRAL adopted a Model Law on International Commercial Arbitration.

The UNCITRAL Model Law quickly attained popularity on the international plane given that, as Lew, Mistelis and Kröll describe, they “*...are autonomous and suitable for use in almost every*

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<sup>19</sup> United Nations Resolution 2205 (XXI) on the Establishment of the United Nations Commission on International Trade Law.

<sup>20</sup> Paulsson, “International Commercial Arbitration”, *Bernstein’s Handbook of Arbitration and Dispute Resolution Practice* in John Tackaberry, Arthur Marriot QC and Ronald Bernstein eds., note 6, at 345.

*kind of arbitration in every part of the world...[and they]...deal with every aspect of arbitration from the formation of the tribunal to rendering an award*".<sup>21</sup> In fact, more than 53 countries have adopted the 1985 Model Law in the last twenty years.

Today, the Model Law provides an essential legal framework for arbitration procedure in many jurisdictions around the world. It sets out the fundamentals of a national arbitration law including, the form of the arbitration agreement, the composition of the arbitral tribunal, the jurisdiction of the tribunal, elementary procedural rules, the award, and recognition and enforcement. Robert Merkin notes that "[t]he Model Law in most respects follows the terms of the UNCITRAL Arbitration Rules so far as those rules deal with these matters".<sup>22</sup> Its widespread adoption by States, institutions and *ad hoc* tribunals such as the Iran-US Claims Tribunal highlights its utility in solving a variety of disputes, as well as its inherent flexibility to adapt to different forums of application.

The Model Law is characterised by a number of notable aspects. The first is the importance of party autonomy accorded to all phases of the arbitration. This is, however, subject to default procedures where no agreement has been reached by the parties. The second noteworthy feature is the right of parties and the

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<sup>21</sup> Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, note 5, at 26.

<sup>22</sup> Robert Merkin, *Arbitration Law*, (3<sup>rd</sup> Ed., Informa Business Publishing, 2004), at 7.

arbitrators, in contrast to the position in most domestic arbitral frameworks, not to apply the domestic law of the forum to the procedural aspects of the arbitration. Third, the role of the courts in the arbitral process is severely restricted. Their involvement is limited to the appointment of arbitrators where no agreement exists, the hearing of challenges to arbitrators, the replacement of arbitrators unwilling to act, the determination of preliminary issues as to the jurisdiction of the arbitrators on appeal from their decision on the point, providing assistance with obtaining evidence and the setting aside of awards on certain grounds. A final and highly significant tenet of the Model Law is that it does not provide for a right to appeal against an error of law.

An apparent blow was dealt to this sweeping global legislative regime in 1989 when the Departmental Advisory Committee (hereinafter “DAC”) in the United Kingdom decided not to adopt the Model Law framework in England and Wales. Instead, it proposed an alternative reform of its antiquated arbitration law by enacting the Arbitration Act 1996.<sup>23</sup> Although expressly not a wholesale incorporation of the Model Law, it is, in many respects, tantamount to such. Notably, however, critical differences between the two legislative frameworks exist.<sup>24</sup>

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<sup>23</sup> A comprehensive discussion of the Departmental Advisory Committee’s Report in 1989 will follow in Chapter 2.

<sup>24</sup> A comparative analysis of the two legislative frameworks will form the subject-matter of Chapter 3.

Arbitration remains broadly successful since, according to the 2008 International Arbitration Study, 92% of arbitration disputes are resolved at some stage through the arbitration proceedings. Furthermore, in the same study, the overwhelming majority of participating corporations indicated that they were satisfied with international arbitration. Among the 5% of respondents who were disappointed with arbitration, concerns stemmed from the spiralling costs and increased delays in arbitral proceedings.<sup>25</sup> Through the course of this inquiry, the systemic causes of these disabling traits will be identified and both quantitatively as well as qualitatively analysed in the various jurisdictions under examination.

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The object of this thesis will be to determine which legislative regime better promotes arbitration as a mechanism for the resolution of commercial disputes. In particular, the fact that one of the world's leading arbitration centres has declined to be party to a growing international legislative regime is curious and its decision to adopt its own scheme to regulate arbitration prompts many questions. It is highly fruitful both in an academic and practical sense, therefore, to evaluate whether the DAC

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<sup>25</sup> Queen Mary University of London School of International Arbitration, *International Arbitration Study: Corporate Attitudes and Practices 2008*, note 8.



made the right choice in its rejection of the UNCITRAL Model Law and, specifically, if the 1996 Act adequately safeguards London in the intended way. Moreover, consideration will be given to whether, in light of contemporary developments in the field of arbitration, it is appropriate to re-evaluate the legislative framework in the United Kingdom as regards arbitral procedure.

In pursuance of the former line of inquiry, this thesis will begin with a deliberation of the DAC's findings in 1989. Careful judgment will be passed on whether the analysis offered and conclusions drawn then have the same relevance today. Admittedly, this is engaged in with benefit of hindsight but it is nevertheless important to conduct given that such a consideration has much normative value for the present thesis. As this report underpins the decision to adopt the Arbitration Act as opposed to the UNCITRAL Model Law and, in addition, helped to shape the contours of the aforementioned Act, it is crucial that its content is tested for its continuing validity.

The third chapter of this thesis will adopt a methodical examination of the Arbitration Act 1996 and the UNCITRAL Model Law. First, those provisions existent within the Act which present a substantive difference with the Model Law will be identified. These will then be subject to an individual inquiry, charting their development through jurisprudence and academic commentary. With a detailed picture of these provisions and their consequential product as borne out through the case law at

hand, it is intended to draw objective lines of analysis as to the present state of arbitration law under the Act. In particular, a critical reflection on the modalities of, and the attitude of the English judiciary to, arbitration will be made but, fundamentally, this will be conducted through the lens of a need to preserve the pre-eminent status of arbitration as a dispute settlement mechanism.

For each of the provisions analysed, the counterpart provision under the Model Law will be objectively examined in a similar way. Consideration will be given to the effects of the provisions of this legislative framework in the various jurisdictions in which it has been enacted.

Next, a comparative analysis – the intended axis around which this thesis is built – between the Arbitration Act 1996 and the UNCITRAL Model Law will ensue. From this, it will be possible to construct arguments as to which offers a better legislative framework for arbitration in the United Kingdom.

The final substantive element of this thesis will look to the recent trends in arbitration around the world, both in terms of the needs of parties to arbitration and also jurisdictional and institutional developments in arbitral procedure. In particular, empirical data will be interpreted with a view to determine the direction of international commercial arbitration. Furthermore, resort will be had to changes that are occurring in certain

jurisdictions – specifically Ireland – and the likely impact that this will have on the popularity of London as a seat of arbitration.

By this wealth of analysis – objective, functional, comparative and empirical – it is hoped that a strong foundation is laid on which to compose pragmatic conclusions for the future advancement of UK arbitration law. Herein will feature the case for the adoption of the Model Law on the basis of a rigorous intellectual examination of each legislative framework – 1996 Act and Model Law, theoretically sound reasoning and having reference to the emerging themes in leading arbitral jurisdictions around the world.

## 2 THE DEVELOPMENT OF ARBITRATION LAW IN ENGLAND

London has long been a leading hub for international commercial arbitration due to its pre-eminence as the centre for shipping, insurance, commodity, and financing businesses. Arbitration became ubiquitous in London, not least because of the volume of commercial transactions and, inevitably, disputes which occurred there. In addition, however, Alexander Goldštajn highlights the traditional link between a centre of arbitration and the application of national law. Typically, it was more convenient for the arbitrator to apply the law of the country of which he was a national when required in arbitral proceedings.<sup>26</sup> England, as the home of the common law, offered a familiar legal regime and a host of specialists suitable to act as arbitrators. These factors placed London firmly on the map as an arbitration centre of choice for businesses the world over.

Given the prominence of London as an international arbitration centre it was essential that the law developed to cater for the needs of those choosing it as a seat. Tweeddale and Tweeddale express the development of arbitration law in England as falling into six distinct periods. Common law governed arbitral proceedings until legislative provision was first made in the

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<sup>26</sup> Alexander Goldštajn, “Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects”, in *Essays on International Commercial Arbitration*, Petar Šarčević ed., (Brill, 1989), at 46.

Statute 9 & 10 Will 3, c.15 of 1698. Then, further statutory provision was made in the Common Law Procedure Act 1854 before the first specific Arbitration Act was enacted in 1889. The Arbitration Act was revised at various chronological intervals until the most recent Act - the subject of this thesis - in 1996.<sup>27</sup>

The 1996 Act was preceded by the Arbitration Act 1950. The latter came under increasingly acute criticism in a number of respects in the 1980s and early 1990s, prompting calls for a total overhaul of arbitration law in the United Kingdom. From a structural point of view, the arrival of the Model Law brought the deficiencies of the 1950 Act into sharp focus. In fact, “[i]ts logic was indefensibly illogical and caused confusion and difficulty to those trying to comprehend it.”<sup>28</sup> Furthermore, there existed no rules for arbitral procedure and it lacked any reference to party autonomy. Rutherford and Sims note that “[i]t was largely preoccupied with the relationship between arbitration and the courts”.<sup>29</sup> In addition, the technique which had been utilised in its drafting was often that of ‘deeming provisions’, whereby, unless a contrary intention was expressed to a particular provision, some condition would be deemed by that provision.

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<sup>27</sup> See Tweeddale and Tweeddale, *A Practical Approach to Arbitration Law*, note 13, at 1.

<sup>28</sup> Margaret Rutherford and John Sims, *Arbitration Act 1996: A Practical Guide* (Sweet and Maxwell, 1996), at 4.

<sup>29</sup> *Ibid.*

The provision which had attracted most criticism under the 1950 Act was the case stated mechanism.<sup>30</sup> This entitled the arbitrator to state any question of law which had arisen during the hearing or the award, in the form of a special case to the High Court. Although the merit of such of a procedure was evident given that it ensured arbitrator's decisions were in accordance with law and, further, it enabled the law to develop in a meaningful way, its demise was facilitated by recourse to this procedure as a delaying tactic. Such an abuse undermined the advantages which arbitration offered as an efficient dispute resolution procedure.

One of the most controversial cases in this regard was that of *Coppee-Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd.*<sup>31</sup> There, an application was made to an English court for an order that the respondent provide security for its costs on the basis that Ken-Ren was an insolvent company. The International Chamber of Commerce Rules governed the conduct of the arbitration and it was argued by Ken-Ren that, therefore, the English courts had no power to intervene. Coppee-Lavalin argued that there was a residual power of the court to order security, although it conceded that such a power should only be used in exceptional circumstances. The House of Lords held that it did have the power to order the respondent to provide security and that there were exceptional circumstances justifying the order.

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<sup>30</sup> Section 21, Arbitration Act 1950.

<sup>31</sup> [1995] 1 AC 38.

Meanwhile, international arbitration centres began to be established outside London with many aggressively pursuing arbitration business. “*The Netherlands, France, Sweden and the Far East tried to seize a share of the multi-million pound industry*”.<sup>32</sup>

The 1979 Arbitration Act was an attempt to redress the disincentives which were turning parties away from London. Crucially, it removed the case stated procedure and replaced it with an alternative appeal process. Under the Act, appeals were to be heard exclusively on points of law with leave for appeal having to be sought beforehand. Through a string of cases,<sup>33</sup> however, the House of Lords had to temper the scope of the appeals procedure to ensure that it too was not abused. Nevertheless, the 1979 Act received its share of disapproval: “*Some have criticised the 1979 Act for having been rushed through the legislative process with indecent haste, some say that it was ill-prepared, made in response to pressure from the international community*”.<sup>34</sup>

Mindful of this and especially the momentum the UNCITRAL Model Law was gaining, the British government initiated the Departmental Advisory Committee to consider whether the UK should adopt the UNCITRAL Model Law. Perhaps surprisingly, the DAC concluded that the UNCITRAL Model Law should

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<sup>32</sup> Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 6.

<sup>33</sup> From the principal case *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, the House of Lords laid down the Nema guidelines to which the right of appeal would be subjected.

<sup>34</sup> Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 6.

not be adopted in England. In June 1989, Lord Justice Mustill, the chair of the Committee, published a report which, although rejecting the Model Law, approved of its presentation and logic (hereinafter “DAC Report”).<sup>35</sup>

The DAC outlined its reasons for the rejection of the Model Law in England and Wales as follows. First, given that the Model Law provides only for international commercial arbitrations, the DAC noted in its report that the introduction of it in England would lead to a divorcing of arbitral regimes: domestic and international. The former being governed by the Arbitration Act and the latter by the Model Law. Secondly, wholesale adoption of the Model Law would remove the existing power of the English courts to correct errors of law. The consequence of such was thought unsatisfactory, leaving those aggrieved by an error in law without a sufficient remedy. The third concern of the DAC related to the existing law, legal framework and experience of lawyers and arbitrators in England. The DAC felt that the Model Law did not resemble a typical English statute and, as a result, those involved in arbitral procedure would be required to substantially revise their existing wealth of knowledge and established approach. Further, although it was accepted that many of the principles enumerated

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<sup>35</sup> Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration*, note 1.



in the Model Law may benefit the legal framework for arbitration in England, others may be damaging.

In the alternative, the DAC highlighted that the Model Law was most suited to those jurisdictions with no developed arbitration law or with a practically redundant corpus of arbitration law. England, however, was not such a jurisdiction given its developed law as well as its standing as a prominent hub of commerce. In sum, the Committee did not consider the adoption of the Model Law an adequate solution to the problems that London faced as an arbitral centre. Substantial statutory reform was, instead, thought the most appropriate way forward.

The DAC's terms of reference in initiating the reform of arbitration law in England was to safeguard London as a leading arbitration centre. Many other jurisdictions were meeting the needs of parties to arbitral agreements by developing their arbitration law in such a way as to make it both accessible and intelligible to the layman.<sup>36</sup> This was an advantage that the UNCITRAL Model Law had over the Arbitration Acts existing in England. Undoubtedly, this influenced the decision to ensure

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<sup>36</sup> *For example* Australia's International Arbitration 1974 concerning procedures for international arbitration, covering all international commercial arbitrations conducted in Australia unless otherwise agreed. The Act also adopted the Convention on the Recognition & Enforcement of Foreign Arbitral Awards and 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention). It further set out the institutions and procedures that are available for the conduct of international arbitration.

the Arbitration Act 1996 was drafted in a straightforward, yet comprehensive manner. It is indeed widely praised for having achieved this object.<sup>37</sup> As Lord and Salzedo comment, “[t]here is no doubt that replacing four Acts with one will make the statutory law easier to find. It is also true that the Act is written in plainer English than was the previous legislation”.<sup>38</sup> Consequentially, however, it is inevitable that detail is sacrificed at the hands of simplicity and these authors go on to caution that “...some of the precision and certainty of the previous law has been lost, especially when it is unclear whether a change in language involves a change in substance or makes the old case law redundant.”<sup>39</sup>

## 2.1 The DAC Report: A Contemporary Rebuttal

The British government, in response to the growing concern as to the state of English arbitration law at the time, set up the Departmental Advisory Committee to review whether UNCITRAL should be adopted in the UK. A profound consideration of the DAC Report is crucial to this thesis given its significant role in the shaping of UK arbitration law as it stands today. It has already been noted that the DAC strongly objected to the adopting of the UNCITRAL Model Law as a wholesale legislative framework in the UK but the

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<sup>37</sup> Richard Lord and Simon Salzedo, *A Guide to the Arbitration Act 1996* (2<sup>nd</sup> Ed., Cavendish Publishing Ltd, 2001).

<sup>38</sup> *Ibid.*, in ‘Introductory Chapter’

<sup>39</sup> *Ibid.*

recommendations exposited in the report, which have not yet been systematically examined, will form the remaining subject-matter of this Chapter. It is hoped that this analysis – a critical reflection of the propositions made by the DAC in light of the current state of arbitration law in the UK - will strengthen the arguments in favour of adopting the Model Law and contribute to the intellectual rigour of this thesis.

An appropriate point of departure for the analysis is to outline the seven primary recommendations put forward by the Committee in respect of a sought-after Arbitration Act. The DAC advocated the following characteristics for the proposed legislative scheme:

- (a) It should comprise a statement in statutory form of the more important principles of the English law of arbitration, statutory and (to the extent practicable) common law.
- (b) It should be limited to those principles whose existence and effect are uncontroversial.
- (c) It should be set out in a logical order, and expressed in language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman.
- (d) It should in general apply to domestic and international arbitrations alike, although there may have to be exceptions to take account of treaty obligations.

- (e) It should not be limited to the subject matter of the Model Law.
- (f) It should embody such of our proposals for legislation as have by then been enacted.
- (g) Consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law.

These principles illustrate that the consideration given by the Departmental Advisory Committee was, perhaps, not quite as adept as is typically thought. The tenor of the DAC Report suggests that the lessons it took from the Model Law - as expressed through these guiding principles - were rather concerned with presentation, logic and accessibility. It occurs to the Author that these recommendations speak to the form that a new legislative framework was to take in contradistinction to any purported substance. Despite the fact that, strictly speaking, these recommendations were beyond the mandate given to the Departmental Advisory Committee (since it was asked to advise on whether or not the Model Law should be adopted), once a decision to include suggestions for the development of arbitration law which were likely to have a profound influence, these should at least have included some of the more substantive elements of the Model Law. For example, it is notable that the

issue of court intervention, one of the catalysts for the reform movement in the UK, is not addressed in any of these seven recommendations.

The following comments of Lord Justice Saville seem to characterise the problem as viewed by the DAC at the time: *“Our law has built up over a very long time indeed. In the main the developments have come from cases, but in addition, from as early as 1698, Parliament has passed legislation dealing with the law of arbitration. To a large degree this legislation has been reactive in nature, putting right perceived defects and deficiencies in the case law. Thus it is not easy for someone new to English arbitration to discover the law, which is spread around a hotchpotch of statutes and countless cases”*.<sup>40</sup>

This focus on codification and accessibility – desirable though these norms admittedly are – may have meant that the need for substantive alteration of arbitral law to some extent became less of a concern, or was overlooked. These remarks are made purely in light of a holistic consideration of the DAC Report given in 1989. Next, a closer analysis of individual propositions contained in the text of that Report is required.

### ***2.1.1 The UNCITRAL Model Law: Suitable Candidates***

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<sup>40</sup> See Karen Tweeddale and Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, 2005).

The Report promptly concluded that the Model Law would not provide a suitable legislative framework for the United Kingdom. In the alternative, the DAC suggested that there were four broad categories of states to whom the UNCITRAL Model Law was primarily directed:

- (1) States with no developed law and practice in the field of arbitration.
- (2) States with a reasonably up-to-date body of arbitration law which has not been greatly used in practice.
- (3) States with an outdated or inaccessible body of arbitration law.
- (4) States with an up-to-date body of arbitration law, and with a sufficient volume of arbitrations over a sufficient period to have permitted the growth of an expertise in putting their law into practice.<sup>41</sup>

The author considers that the DAC's perception in this regard is somewhat troubling. A number of states, which seemingly do not fit into these categories had, or have since, enacted the Model Law. The USA (California, Connecticut, Illinois, Louisiana, Oregon and Texas), Singapore, Australia, Canada, Germany and Norway come to mind in this respect. It follows that the categories are, to some extent, redundant today given that they do not comprise all states which have now adopted the

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<sup>41</sup> Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration*, note 1, at 10.

Model Law. Furthermore, one of the criticisms of UK arbitration law at the time that the DAC had to address was the inaccessibility of the law. Bearing in mind the descriptions that Committee provide for each group, it seems that the UK system would have fitted squarely into the third category: “[f]or states within the third category, enactment of the Model Law will bring their arbitration law up-to-date and at the same time render it more easily accessible to the legal and business communities”.<sup>42</sup>

The DAC noted in the Report a factor which, in their view, was essential to take into consideration: “*The number of states which have so far enacted, or are planning to enact the Model Law, is modest and some major trading nations have recently enacted legislation which is inconsistent with the Model Law.*”<sup>43</sup>

The number of States which have now adopted the Model Law stands at sixty-eight. This is far from being an insubstantial number. It should be conceded that the majority of these nations adopted the Model Law following the DAC Report but this in itself serves to illustrate that, 20 years on from the DAC Report, the UNCITRAL Model Law is worth reconsidering in the light of contemporary developments. Furthermore, the Committee stated that: “*...the fact remains, however, that of those nations where practically all of the world’s truly international arbitrations are currently held none have so far shown any signs of an intention to enact*

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<sup>42</sup> *Ibid.*, at 10.

<sup>43</sup> *Ibid.*, at 16.

*the Model Law unaltered, although some have decided to use it as a pattern.*<sup>44</sup>

In this respect the abovementioned states, particularly the emerging arbitral centres such as in Norway and Germany, provide sound examples for rebutting such an assertion. The adoption by these states in particular, and, more generally, the increasingly widespread acceptance of the Model Law illustrate not only its substantive appeal and workability in a variety of jurisdictions but, in addition, it serves to obviate the increasingly isolated position of London, an arbitral hub which does not exist in a jurisdiction in which the Model Law has been adopted.

A final point that should be made having regard to implementation is the value that the DAC accorded to harmonisation. The DAC noted that considerations of harmonisation as an end in itself carry very much less weight than considerations relating to the intrinsic merits of the Model Law. Lord Steyn has stated in a relatively recent article that, “[n]ot all the reasons put forward in 1989 for not adopting the Model Law seem as compelling today as they did then”.<sup>45</sup> It is urged that this is directly on point with respect to the issue of harmonisation. Indeed he highlights that the Departmental Advisory

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<sup>44</sup> *Ibid.*

<sup>45</sup> Lord Steyn, “England’s Response to the UNCITRAL Model Law of Arbitration” in *Arbitration Insights, Twenty Years of the Annual Lecture of the School of International Arbitration*, Lew and Mistelis eds. (Kluwer Law International, 2007), at 135.



Committee, in their Report, noted at the time: “*The arguments in favour of enacting the Model Law in the interests of harmonisation, or thereby keeping in step with other nations, are of little weight. The majority of trading nations, and more notably those to which international arbitrations have tended to gravitate, have not chosen thus to keep in step.*”<sup>46</sup>

This, he contends, is no longer an acceptable assertion and further illustrates the outmoded nature of the Report today. “*That was a judgment made four years after the publication of the Model Law. Today one would have to revise that judgment*”.<sup>47</sup> Although it is important to point out that Lord Steyn remains supportive of the rejection of the Model Law in England, it is interesting for the purposes of the present analysis that he accepts the original reasons for such may not have relevance today.

The Author would submit that the importance of harmonisation carries much more weight today than it did in the late 1980’s for three primary reasons. First, the nature of business has changed significantly and in modern commerce, as a result of increasing globalisation, it is fundamental that businesses be able to trade multilaterally in an efficient fashion. Second, the arbitral landscape has changed around the world. Not only has it

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<sup>46</sup> Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration*, note 1., at 2.

<sup>47</sup> Lord Steyn, “England’s Response to the UNCITRAL Model Law of Arbitration” in *Arbitration Insights, Twenty Years of the Annual Lecture of the School of International Arbitration*, Lew and Mistelis eds., note 45, at 135.

become more ubiquitous as a method of dispute resolution but, further, a number of arbitral centres have emerged since the publication of the DAC Report in 1989. Finally, the recent economic crisis brings into sharp focus the fragility of international trade and illustrates that there is a persisting need for governments not to take inward investment for granted. The challenge now is to make trade as attractive as possible; harmonisation of arbitration laws, amongst other factors, is part of this overarching project.

### ***2.1.2 Substantive Analysis***

From paragraph 86 of the Report, the DAC engage in a consideration of individual articles of the Model Law to which this examination will now turn. It is difficult to refrain from commenting on the cursory manner in which the DAC undertakes this analysis. Each article is considered somewhat superficially and little explanation is offered as to the actual effect the respective articles would have on the law of arbitration in the UK. The Committee defend this, “[w]e see little purpose in burdening this report with a lengthy discussion of these various changes”.<sup>48</sup> The Author(s) would like to have seen a more detailed analysis in respect of each article of the Model Law and especially a greater emphasis on the effect that each would bring in practice.

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<sup>48</sup> Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration*, note 1, at 22.

It should be noted that the Report posits that “[t]he impact of each Article is set out in Part II of the Consultative Document [in Appendix 2]”, although little attempt is made to anticipate the likely effect of each article even in this more detailed consideration. In the body of the Report, however, the Committee simply decided to characterise the provisions within the ambit of its consideration according to three groupings:

1. Provisions which would be beneficial or neutral;
2. Provisions where the benefits were debateable; and
3. Provisions which would be detrimental.

A critical analysis of the categorisation of certain articles of the UNCITRAL Model Law as well as the commentary provided by the DAC on each of these will presently ensue. As is notable from the title of the categories, a purely objective consideration of the articles which formed the subject of examination was not conducted. By categorising in this manner, the direction of the ensuing analysis is, to some extent, predetermined. In particular, it is argued that such a framework is likely to have constricted a holistic analysis of the effect of each provision.

The Author perceives that such an approach is most evident in respect of the consideration of Article 16 of the Model Law. This concerns the competence of the tribunal to rule on its own jurisdiction – a principle which, as will be adverted to later in this thesis, had not been on the English Statute Book until the

enactment of the Arbitration Act in 1996, despite it being widely accepted in jurisdictions around the world. Nevertheless, the Committee concluded that this was a provision of the Model Law whose substantive benefits were debateable. Although noting that it would “*put beyond doubt that separability of the arbitration agreement is recognised by English law*”,<sup>49</sup> they went on to undermine the benefit of such by introducing an antithetical factor to the notion of Kompetenz-Kompetenz. The Report asserts that the codification of such a principle “*would in practice impose undesirable time and cost constraints on the procedure for challenging the jurisdiction of arbitrators*”.<sup>50</sup> The Author would argue that the placing on a statutory footing of this principle would be likely to have the diametrically opposite effect to that described by the DAC. Where competence is shifted from the courts to arbitrators as regards ruling on jurisdiction, the very benefit of such a move is to speed up the arbitral procedure, and, in addition, to make it more economical by reducing the costs associated with proceedings in court. It may be speculated that the DAC considered such a conferral of jurisdiction to operate in addition to, rather than by way of substituting a hearing in the courts on this ground. On the contrary, it is submitted that the very essence of the principle of Kompetenz-Kompetenz is to transfer jurisdiction from the courts to the arbitrator and thus strengthen the procedural foundation of the latter. The

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<sup>49</sup> *Ibid.*, at 23.

<sup>50</sup> *Ibid.*

exposition provided for in the appendix appears to confirm that this is what the DAC envisaged: “*The Model Law provides that the arbitral tribunal may rule on its own jurisdiction; it enjoins a prompt raising of the issue; and provides for a right to seek a decision on the tribunal’s ruling within 30 days. In English law the position is that the court has the last word, without the procedural and time constraints of the Model Law.*”<sup>51</sup>

We turn now to the more detailed consideration of each article provided for in the Appendix of the DAC Report. The Author would first like to discuss Article 5 of the Model Law and the manner in which it is dealt with by the DAC. Article 5 of the Model Law concerns the curtailment of judicial intervention in the arbitral process. The DAC Report highlights the uncertainty as to the scope of Article 5 and the difference in opinion over its purpose, which the Committee noted “*have presented a number of conceptual difficulties*”, although it refrained from recalling these in the Report.<sup>52</sup> However, it is submitted on the contrary that the effect of Article 5 is quite clear. It restricts the intervention of the court to a defined arena. Within this boundary it is evident that intervention may only occur in the circumstances envisaged by Article 34(2) and also to Articles 11(3), (4), 13(3), 14(1), 16(3) and 27. Further, within the allotted field, judicial intervention

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<sup>51</sup> *Ibid.*, Appendix I.

<sup>52</sup> *Ibid.*, at 50.

may only take place in the case of “recourse to a court against an arbitral award”, by means of setting aside or remission.

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The following extract from the Report appears to appropriately capture the key tenets which later emerged in the Arbitration Act: *“The ideal system of arbitration law in the view of the Committee is one which gives the parties and their arbitrators a legal underpinning for the conduct of disputes which combines the maximum flexibility and freedom of choice in matters of procedure with a sufficiently clear and comprehensive set of remedies which will permit the coercive, supportive and corrective powers of the courts to be invoked when, but only when, the purely consensual relationships have broken down.”*<sup>53</sup>

The key phrase here is ‘set of remedies which will permit the coercive, supportive and corrective powers of the courts to be invoked’. This confirms that the DAC had in mind that the courts must retain an element of control over the arbitral process and goes a long way to explaining the subsequent differences which emerged in the Arbitration Act. The balance

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<sup>53</sup> *Ibid.*

between the autonomy of the arbitral process and judicial intervention as set out in this closing paragraph is akin to that which appears in the 1996 Act. This only reinforces the assertion that the DAC Report had an influential role in the shaping of UK arbitration law as it presently stands and thus the need to critically reflect on the findings of the Report in an effort to determine what is best for the procedure of arbitration today is apt. In particular, it is submitted that the most important consideration today - contrary to the findings of the DAC in 1989 - is harmonisation, given the increasingly globalised nature of business and also bearing in mind that many new countries have adopted the UNICTRAL Model Law since the DAC made their determination. In the current economic climate, it is essential that the UK is not left behind.

## **2.2 The Arbitration Act 1996: an Overview**

The DAC Report prompted the parliamentary drafting of a new Arbitration Bill which became law in 1996. The Act has been described as “*probably the most radical piece of legislation in the history of English arbitration law*”<sup>54</sup> given its comprehensive nature. The drafting history of the Bill reveals that the legislature very much intended this. Initially, the long title of the Act read “An Act to consolidate with amendments the Arbitration Acts 1950, 1975 and 1979 and related enactments”, however, it later became “*An*

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<sup>54</sup> Tweeddale and Tweeddale, *A Practical Approach to Arbitration Law*, note 13 at 1.

*Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes’*.<sup>55</sup>

Although it is common for national legislation to avoid defining arbitration, it is noteworthy that the 1996 Act helpfully enumerates some guiding principles. It sets out, first, that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense and, secondly, that parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.<sup>56</sup>

In addition to being comprehensive, certain characteristics common to the UNCITRAL Model Laws are evident in the 1996 Act. In particular, it is logical, clear and has the principles of ‘party autonomy’ as well as ‘judicial non-intervention’ as central themes in the Act. Tweeddale and Tweeddale comment that: “[a]lthough at its conception it was agreed that the Arbitration Act 1996 would not enact without modification the UNCITRAL Model Law it is clear from the use of language and format that the Law has played a major role in the shape that the Act has taken”.<sup>57</sup>

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<sup>55</sup> See Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 19.

<sup>56</sup> See Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration*, note 5.

<sup>57</sup> Tweeddale and Tweeddale, *A Practical Approach to Arbitration Law*, note 13, at 35.



The DAC, in their report, determined that a principled approach would be necessary in the new arbitration statute. Three guiding rationales underlie the 1996 Act. Procedural fairness, party autonomy and judicial restraint are the intended doctrinal foundations of the Act's provisions. There would, however, appear to exist internal tensions within these noble objectives.<sup>58</sup>

Within the first principle – procedural fairness – lies a potential conflict between expediency and due process. These ends are difficult to equate in arbitral proceedings, more so than in litigation, as a premium is placed on speed and economy. As Park notes: “[w]hat appears as undue delay to a claimant expecting an easy win may be dressed as an essential due process or natural justice to a defendant anxious to present its case more fully”.<sup>59</sup> Second, although the parties’ agreement is paramount, this may be overridden by certain mandatory rules as the public interest requires and to ensure the integrity of the arbitration. For example the Act requires an arbitrator to act impartially and efficiently, a further area of probable conflict in principle. Finally, judges are expected, according to the statute, to exercise restraint in arbitral intervention. This is not, however, absolute and the Act permits courts to exercise their inherent jurisdiction to alleviate injustice where necessary.

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<sup>58</sup> See William W. Park, “The Interaction of Courts and Arbitrators in England: the 1996 Act as a Model for the United States?” (1998) *International Arbitration Law Review* 54.

<sup>59</sup> *Ibid*, at 57.

The Arbitration Act 1996 contains four parts. The first of these is the most substantive and deals with arbitrations conducted pursuant to an arbitration agreement. Many general principles and definitions appear under this part, particularly having regard to the constitution of the arbitration agreement itself. It is arranged in a logical manner, dealing with arbitral procedure in a chronological way. First the procedure for the commencement of arbitration is outlined and then the intricacies of the tribunal are dealt with. The award of the arbitration is considered at the latter end of Part I. At each stage of the arbitral proceedings the power of the courts in respect of such is clearly detailed. Furthermore, in a novel step for English arbitration legislation, the power of the tribunal to rule on its own jurisdiction is given at section 30 of the 1996 Act.

The remaining parts of the Act contain 25 sections, in contrast to the 84 enumerated in Part I. Part II concerns other provisions relating to arbitration such as purely domestic arbitration agreements, consumer arbitration agreements and small claims arbitration in the county court. Part III essentially adopts the New York Convention on the Recognition and Enforcement of Arbitral Awards as set out under Part II of the Arbitration Act 1950. Finally, Part 4 sets out 5 general provisions.

The provisions of the Act may be split into two primary categories: mandatory and non-mandatory sections. Bruce Harris, Rowan Planterose and Jonathan Tecks submit that the

distinction “... *is fundamental to the scheme of Part I of the Act*”.<sup>60</sup> This is provided for under section 4 of the Act. Section 4(1) outlines that mandatory provisions contained within the Act apply “*notwithstanding any agreement to the contrary*”. In other words, parties may not agree to contract out of these provisions, even if the consent to do so is mutual as between the parties. An example of such a provision is the Court’s power to stay legal proceedings, as set out in sections 8 to 11 of the Act.

On the other hand, the non-mandatory provisions enable parties to agree terms as they wish, but, in the absence of an agreement, will apply as the default position. Harris, Planterose and Tecks note that within the terminological construction of the non-mandatory provisions, different formulae is utilised. For example, section 16 of the Arbitration Act provides, “[*t*]he parties are free to agree on the procedure for appointing the arbitrator...If or to the extent that there is no such agreement, the following provisions apply...”. The authors highlight that given this construction, the default rules apply, unless *expressly* contracted out of or contradicted (emphasis added). Conversely, section 14 provides an example of the other form of wording used – “[*t*]he parties are free to agree when arbitral proceedings are to be regarded as commenced...If there is no such agreement, the following provisions apply...” – whereby any agreement “...*will oust all the default rules*”.<sup>61</sup> As is evident from

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<sup>60</sup> Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (3<sup>rd</sup> Ed., Wiley Blackwell, 2003), at 68.

<sup>61</sup> Extracted from *Ibid.*, at 70.

this comparison, the subtle difference in the operative wording of non-mandatory provisions has a decisive influence on the specificity of the agreement required, of which the parties will need to be acutely cognisant.

The abovementioned distinction between mandatory and non-mandatory provisions in the 1996 Act represents a novel development in UK arbitration law. Previous Arbitration Acts did not provide for such a distinction. Although it should be noted that the 1950 Act did make provision for an overriding agreement between the parties in respect of certain matters which were enumerated in the Act. The new addition shows strong support for the principle of party autonomy and, as Harris, Planterose and Tecks point out, the majority of sections in Part I are non-mandatory. However, they go on to note that the balance of sections as listed in schedule 1 are mandatory in nature and “[t]he scope of party autonomy is thereby restricted”.<sup>62</sup>

The major themes which will be dealt with in this thesis are of critical importance in any assessment of the Arbitration Act, not least because they illustrate the primary differences between the Act and the Model Law. These concepts will be explained in great detail under Chapter 3, but it nevertheless is beneficial to highlight these at this stage in order to build up a picture of the Arbitration Act as a complete legislative framework. A brief

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<sup>62</sup> *Ibid.*, at 69.

survey of the sections to feature in this thesis will henceforth follow.

#### *a) Separability*

It is Section 7 of the 1996 Act which provides for the principle of separability in English Law and is reproduced below: “*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*”.

Although this provision represents the first appearance for separability on the statute book of England and Wales, it nevertheless codifies existing practice evident through case law. In effect, it puts the principle that an underlying arbitration agreement within a contract or agreement between two parties survives despite the overarching contract or agreement not surviving. The phrasing of the section necessarily implies that it is non-mandatory since it provides that parties may agree to opt out. This latter requirement, however, must be done in writing as is stipulated by section 5 of the 1996 Act.

As Harris Planterose and Tecks point out, the phrase ‘for that purpose’ in the section narrows the scope of application of the separability principle. The wording implies that it may only be extended to situations of invalidity, non-existence or ineffectiveness of the substantive agreement over the arbitration

agreement, “[t]hey do not therefore affect the question of whether an assignment of rights under the substantive agreement carries with it the right or obligation to submit to arbitration in accordance with the arbitration agreement”.<sup>63</sup>

*b) Kompetenz-Kompetenz*

Unlike the Model Law, the Arbitration Act deals with Kompetenz-Kompetenz in a separate provision to the principle of separability. As with the previous section considered, this provision is non-mandatory since the phrase, ‘unless otherwise agreed by the parties’ appears. It is section 30 of the arbitral tribunal which concerns the tribunal’s power to rule on its own jurisdiction and it provides thus: “*Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to*

- (a) Whether there is a valid arbitration agreement,*
- (b) Whether the tribunal is properly constituted, and*
- (c) What matters have been submitted to arbitration in accordance with the arbitration agreement.”*

The link made by the Model Law between the principle of separability and that of competence is also borne out in part (a) of the above section. Given that, under section 7 of the Act an

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<sup>63</sup> *Ibid.*, at 82.

arbitral tribunal may separate an arbitration agreement from an overarching agreement between the parties it may also determine the validity of the arbitration agreement.

Reference may be made to the DAC Report in an effort to delineate the scope of the section. It was the intention of the DAC to ensure that time was not wasted with “*spurious challenges to [the tribunal’s] jurisdiction*”,<sup>64</sup> and therefore the doctrine of kompetenz-kompetenz would be placed on a statutory footing.

### *c) Stay of legal proceedings*

Section 9 of the Arbitration Act 1996 provides for a stay of legal proceedings to be imposed where an arbitration agreement requires that the matter be referred to arbitration. Some commentators have highlighted that this section has been the subject of more court decisions than any other under the Arbitration Act 1996.<sup>65</sup>

The section makes clear that it is only a party against whom legal proceedings are brought that may apply to the court for a grant of stay of legal proceedings. Furthermore, at subsection 4 of the provision it is stated that “*the court shall grant a stay unless satisfied*

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<sup>64</sup> Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law on International Commercial Arbitration*, note 1, at 138.

<sup>65</sup> Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary*, note 60, at 82.



*that the arbitration agreement is null void, inoperative, or incapable of being performed*'. The threshold is therefore relatively low for the court to grant such a stay as it may only be shown that the arbitration agreement is valid and that the matter before the court falls within that agreement.

#### *d) Court Intervention*

Any discussion of judicial intervention in arbitral proceedings under English arbitration law should be viewed through the prism of Section 1(c) of the Arbitration Act 1996. This makes clear that courts “*should not*” intervene in arbitral proceedings “*except as provided for*” by the Act. The premise is therefore that the court may intervene where it is licensed to do so under the Act and should refrain from doing so outside these parameters. In this Thesis, the modalities of intervention as set out in the Act will be divided into three broad categories: those powers before, during and after arbitral proceedings which permit judicial intervention will be considered. First, prior to the start of arbitral proceedings a court may intervene by extending time limits for the commencement of arbitration proceedings under sections 12(1) and (3) of the Arbitration Act 1996. This may occur where the contractual time limit, originally agreed by the parties for the bringing of arbitral proceedings, runs out. It is, however, required by the proceeding subsection that any arbitral

mechanisms for the granting of such an application are first exhausted. In this sense, the court is a last resort.

The second instance of intervention that this thesis intends to make reference to is that of judicial discretion to appoint arbitrators under section 18 of the Act. This is a case in point of the courts asserting their power over the arbitral process in order to support it. The section provides: *If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.* The court's role in this respect is therefore to positively help the arbitral procedure in an effort to avoid its failure at the 'first hurdle' where parties do not agree upon the appointment of an arbitrator.

During the arbitral process, there are a number of ways in which the court is permitted to intervene. Primarily, the court may grant certain interim measures, grant a stay of legal proceedings and, further, is entitled to exercise its inherent jurisdiction in some circumstances.

Some of the measures that a court may advocate in supporting the arbitral process include, in accordance with section 44 of the Arbitration Act, the taking of the evidence of witnesses, the preservation of evidence, making orders relating to property which is the subject of the proceedings, the sale of any goods the subject of the proceedings, the granting of an interim injunction

or the appointment of a receiver. Furthermore, where court proceedings are commenced in breach of the valid agreement between the parties to submit their disputes to arbitration, the court may, under section 9 of the Arbitration Act, stay those litigation proceedings. Finally, the court retains its inherent jurisdiction to intervene in arbitral proceedings at any stage.

Judicial intervention after the award may be characterised in terms of enforcement, challenge or appeal of the arbitral award. To this end, the Arbitration Act 1996 makes provision for all three through the courts. Under section 66, an award may be enforced where this is necessary. Alternatively, the award may be challenged or appealed on the grounds of a lack of jurisdiction under section 67 of the Act, where there is a serious irregularity or where a party has suffered a substantial injustice in accordance with section 68, and, under section 69 where the appeal relates to a substantive point of law.

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As is evident from this brief survey of the Arbitration Act, its provisions are relatively wide-ranging and tend to be prescriptive in nature. This indeed was the objective of the DAC when they set out to construct a legislative regime which would overhaul UK arbitration law and, although drawing upon the provisions

of the Model Law, the committee ultimately chose to reject its wholesale incorporation in an effort to build upon and better it. The task now is to assess whether the DAC achieved the balance that had to be struck, on the one hand, in preserving London as a leading arbitral centre, and, on the other, in retaining the wealth of jurisprudence which had built up in English commercial law more generally.

### **3 THE ARBITRATION ACT 1996 *VERSUS* THE UNCITRAL MODEL LAW: AN OBJECTIVE AND COMPARATIVE ANALYSIS**

The object of this chapter is to consider specific provisions of the Arbitration Act and to analyse these on a functional and comparative basis. The methodology of examination will follow a clear and consistent structure throughout the Chapter. Under each section an overview of the issue to be discussed will be provided initially. Following this, an objective analysis will ensue of the Arbitration Act provision in point and, in addition, any counterpart under the Model Law will likewise be considered. The critical part of the methodology will be to conduct a comparative analysis between the respective provisions of the Act and the Model Law with a view to determining which is better for arbitration as an autonomous and effective method of settling disputes. The latter determination will form the basis of the conclusions drawn under each section.

The issues that will be addressed in the Chapter will comprise the primary differences that exist between the two legislative frameworks. These include the separability of the arbitration agreement, Kompetenz-Kompetenz and judicial intervention: before, during and after arbitral proceedings. In respect of the latter, the major themes to be addressed encompass the discretion to appoint arbitrators by the court, interim measures as a means of assistance in arbitral proceedings, as well as the challenge and appeal of the arbitral award. First, however, an

issue that is scarcely adverted to by either the Arbitration Act or the Model Law is the subject of a critical examination.

### 3.1 Arbitrability

Arbitration is a method of settling disputes that serves as an alternative to litigation and which is premised on the fundamental principle of party autonomy. However, it is difficult to distinguish this private procedure from the state's sovereignty over the jurisdictional function and therefore, by implication, the arbitral process is subject to the limits on arbitrability established by the domestic legal system. In other words, “[*Arbitrability*] determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins.”<sup>66</sup> It therefore represents the litmus test of arbitral procedure by which those matters most suited to resolution by arbitration are determined. Thus, the principle of party autonomy – the right of parties to submit any dispute to arbitration – and the suitability of an issue to arbitration must be balanced.

The question of whether particular disputes can be referred to arbitration is for each State to determine on the basis of different criteria, i.e. the economic nature of the dispute, the possibility for the dispute to be settled, the impact of the dispute

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<sup>66</sup> Thomas Carbonneau and Janson, *The Law and Practice of Arbitration*, (2<sup>nd</sup> Ed., Juris Publishing, 2007), at 194.

on public policy rules.<sup>67</sup> In other words, “*The concept of arbitrability, properly so called, relates to public policy limitation upon arbitration as a method of settling disputes. Each State may decide, in accordance with its own economic and social policy which matters can be settled by arbitration and which may not. In international cases arbitrability involves the balancing of competing policy considerations.*”<sup>68</sup>

Even though there is no internationally accepted definition as to what disputes can be referred to arbitrators, many domestic legal systems generally reserve criminal law as well as family law matters to the domain of the public judiciary. In the same vein, also some commercial matters, such as intellectual property or antitrust disputes, have often been considered non-arbitrable. Broadly speaking, public policy shapes the contours of arbitrability.

However, as Mistelis points out, “*...not every rule of public policy justifies reserving the disputes involved for determination by state courts*”.<sup>69</sup>

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<sup>67</sup> Even though the concept of arbitrability is by each State to be determined and no homogeneous and independent concept exists, European Member States use two main criteria to establish whether or not a dispute is arbitrable. In some EU Member States, the arbitrability of the dispute is determined by the nature of the disputed right or by the nature of transferable or property related right (see, for instance, in Italy, Article 808 *Codice di Procedura Civile*, in Belgium, Article 1676 *Code Judiciaire* and Article 6 and 2045 *Code Civil*, in Netherlands, Article 1020(3) arbitration law December 1986), while in other Member States, namely in France (see Article 2059 and 2060 *code civil*), the arbitrability is determined by reference to the notion of public policy.

<sup>68</sup> Redfern and Hunter, *International Commercial Arbitration*, note 4, at 137

<sup>69</sup> Loukas A Mistelis, “Arbitrability – International and Comparative Perspectives” in Loukas Mistelis and Stravros Brekoulakis eds. (Kluwer Law International, 2009) at 4.

Accordingly, Brekoulakis goes as far as to say “...*the relevance of public policy to the discussion of arbitrability is essentially very limited, and therefore, the scope of inarbitrability should not be determined by reference to public policy*”.<sup>70</sup> He brings to bare other variables which influence the exercise of this instrument of dispute resolution: “*Arbitration...has inherent limitations. Based on consent, arbitration has intrinsic difficulties to affect a circle of persons other than the contractual parties to an arbitration agreement....Eventually, arbitrability should be determined on the basis of efficiency: whether an arbitral tribunal can get disposed of the pending dispute in an effective manner*”.<sup>71</sup>

This is arguably a sensible approach in developing a methodology for arbitrability. Given that arbitration is a consensual process and relies for its justification on the twin advantages of economy and efficiency, the arbitral tribunal itself should exercise its jurisdiction discriminately to ensure that it only presides over appropriate disputes. This argument is concisely articulated by Mistelis: “[t]ribunals should only be dealing with disputes specifically referred to them by the disputing parties and should exercise self-restraint if certain matters before them are manifestly inarbitrable”.<sup>72</sup>

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<sup>70</sup> Stravros Brekoulakis, “Arbitrability – Persisting Misconceptions and New Areas of Concern” in Loukas Mistelis and Stravros Brekoulakis eds., note 69, at 32.

<sup>71</sup> *Ibid.*, at 44.

<sup>72</sup> Mistelis, “Arbitrability – International and Comparative Perspectives” in Loukas Mistelis and Stravros Brekoulakis eds., note 69, at 9.



The following section will consider the provision for arbitrability under English law, primarily noting the absence of definition that exists. This lack of definition is problematic and a survey of the case law will demonstrate the challenges that the courts have faced in this regard. Next, it is intended that the position under the Model Law be examined with a view to highlighting the difficulties of developing an international conception of arbitrability. To conclude this section, the author will outline their own roadmap methodology for arbitrability as a preliminary matter to arbitral proceedings.

*a) Arbitration Act 1996 Provision: Objective Analysis*

Somewhat surprisingly, the Arbitration Act 1996 does not expressly cover arbitrability, as is the case in many other jurisdictions with the exception of Switzerland and Germany, whose laws address the issue in general terms.<sup>73</sup> Also, English courts have not paid too much attention to the arbitrability topic, since they have instead, more frequently, dealt with the interpretation of the arbitration agreement in order to define its scope of application *rationae materiae*.

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<sup>73</sup> Lord Mustill and Stewart Boyd, *Commercial Arbitration – 2001 Companion* (2<sup>nd</sup> Ed., Butterworths London, 2001), at 70. For example, Swiss Law provides “any dispute involving financial interests can be the subject of arbitration”, Swiss Private International Law Act, Article 177(1). The German Code of Civil Procedure provides that parties may arbitrate “any claim involving an economic interest”, at Section 1030.

As will now be evidenced, the lack of definition in English statutory law has caused some difficulties for the courts in carving out the precise scope of arbitration. It is particularly difficult to delineate the role of arbitral tribunals given their present status as an alternative to litigation. This conception of arbitration is in contradistinction to the classical notion of arbitration in which it existed as a subset of litigation.

Lord Justice Hurst has offered a relatively definitive notion of arbitration in the English jurisdiction: *“To my mind the hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law.”*<sup>74</sup>

Although this refines the concept of an arbitral procedure, it does not give much guidance as to the nature of those issues that are arbitrable.

There are, however, some judgments that have played a role in determining which disputes can be referred to arbitration within the UK legal System.

First, in *O’Callaghan v Coral Racing Ltd*<sup>75</sup> a dispute occurred in relation to a gaming transaction which was rendered null and

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<sup>74</sup> *O’Callaghan v Coral Racing Ltd* (1998) The Times, Court of Appeal, per Hurst LJ.

<sup>75</sup> *O’Callaghan v Coral Racing Ltd* (1998) The Times, Court of Appeal.

void under the Gaming Act 1845. It was held that since the latter dispute no longer involved a determination of legal rights, the arbitral tribunal did not have jurisdiction to determine the dispute.

In a similar vein, the case of *Soleimany v Soleimany*,<sup>76</sup> is authority for the proposition that the dispute must be capable of legal resolution. In that case, for reasons of public policy, the Court of Appeal refused to enforce an English arbitration award issued on the basis of the Jewish law (which according to the contract was the applicable law), as the dispute arose in relation to a company practice deemed to be illegal under UK law.

On the other hand, Tweeddale and Tweeddale highlight that the “*arbitral tribunal derives its jurisdiction from the consent of the parties, from an order of the court or from statute*”.<sup>77</sup> They make reference to two cases in which it was stressed that the consent of the parties is at the heart of arbitral jurisdiction. This was explicitly stated in *Walkinshaw v Diniz*,<sup>78</sup> in which the Court held that a characteristic of arbitration was that the arbitral tribunal was chosen, either by the parties, or by a method to which they have consented. A similar finding was implicit in the case of *Al Midani v Al Midani*,<sup>79</sup> where the parties agreed to refer disputes to an

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<sup>76</sup> (1998) 3 WLR 811.

<sup>77</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 494.

<sup>78</sup> [2000] 2 All ER (Comm) 237.

<sup>79</sup> (1999) 1 Lloyd's Rep 923.

'Islamic Judicial Body' without having any participation in its appointment. An arbitration agreement could not be implied in this instance given that there was no mention of arbitration and the utilisation of the words 'Judicial Body' suggested that determination be by the judiciary as opposed to an arbitral tribunal.

As is demonstrated from this brief excursion, some limited principles may be extracted from the case law regarding arbitrability in the UK. These include that a civil dispute exists between parties, which is capable of legal determination. Furthermore, prior consent that the dispute be referred to arbitration is relevant to establishing the jurisdiction of the arbitral procedure. It may be asserted, nevertheless, that the precise scope of arbitrability is still far from clear following a survey of UK jurisprudence. The position under the Model Law will now be considered in an effort to determine whether a more satisfactory delineation may be obtained in an alternative framework.

#### *b) UNCITRAL Model Law Provision: Objective Analysis*

As with the Arbitration Act 1996, the UNCITRAL Model Law neither provides any definition of which disputes are arbitrable. During the deliberations on the Model Law, it became clear that

agreement would not be reached on such a definition.<sup>80</sup> This is largely due to the chasm of difference that exists between each state's perceptions of what issues are of such public importance so as to be left to the public judicature. In fact, Article 1(5) provides that it is not intended to affect other laws of the state that preclude certain disputes being referred to arbitration. Thus, where the Model Law is implemented in a domestic legal system, it is left to the legislature to decide those issues which are arbitrable and those which are not.

As is becoming clear, “[t]here is no internationally accepted opinion as to what matters are arbitrable”.<sup>81</sup> Mustill and Boyd go as far as to say that “the attempt to draw up a list containing the common factors which determine inarbitrability was bound to fail, and has failed”.<sup>82</sup> They go on to note that “...in the majority of instruments where one might expect to find a definition there is none”.<sup>83</sup> Despite this somewhat cynical outlook however, endeavours are still being made to reach some consensus on an international delimitation of arbitrability. UNCITRAL has published a paper entitled ‘Possible Future Work in the Area of International Commercial Arbitration’<sup>84</sup> which flags the need to reach global agreement on arbitrability. The Committee

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<sup>80</sup> Howard Holtzmann and Joseph Newhaus, *A Guide to the UNCITRAL Model Law* (Kluwer Law International, 1989), at 135.

<sup>81</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 107.

<sup>82</sup> Mustill and Boyd, *Commercial Arbitration – 2001 Companion* (2001), note 73 at 71.

<sup>83</sup> *Ibid.*

<sup>84</sup> UNCITRAL A/CN.9/460, at paras 32 to 34.

has made some tentative inroads in developing an international concept of arbitrability by suggesting that UNCITRAL should request each country to list the issues which that country considers are not arbitrable. This would facilitate parties to an international contract gaining an understanding as to whether their disputes are capable of settlement by arbitration at the seat of the arbitration and if their awards are likely to be enforced. This would appear to be a step in the right direction as far as UNCITRAL is concerned and may lead to an international definition in the Model Law at some point in the future. At present, however, this issue remains conspicuous by its absence from the legislative framework.

By way of an attempt to carve out some broad principles, Tweeddale and Tweeddale note that a general presumption in favour of the validity of arbitration agreements was established in *Oldroyd v Elmira Savings Bank FSB*,<sup>85</sup> and further explain that this “...also translates into a presumption that disputes are arbitrable”.<sup>86</sup> Indeed, they go on to note that this proposition seems to have been confirmed in the US case *Moses H Cone Memorial Hospital v Mercury Construction Corp*, in which it was held that “any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defence to

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<sup>85</sup> 134 F 3d 72, at 76 (2<sup>nd</sup> Cir 1998).

<sup>86</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 108.

*arbitrability*”.<sup>87</sup> Further, in *Deloitte Noraudit A/S v Deloitte Haskins & Sells US*,<sup>88</sup> it was asserted that where there is an international relationship between the parties, this presumption may be greater.

Some limited guidance on international trends in respect of arbitrability may be garnered from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article II(1) of the Convention emphasises that each of the contracting States: “...recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”

Tweeddale and Tweeddale point out that this is the provision in the Convention which creates a presumption in favour of arbitration but are keen to highlight that this does not necessarily amount to a presumption in favour of arbitrability. In *ACD Tridon Inc v Tridon Australia Pty Ltd*,<sup>89</sup> it was firmly held by the New South Wales Supreme Court the assertion of such a presumption would not be entertained. This is significant since it further highlights the vacuum which exists at the international level regarding the issue of arbitrability.

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<sup>87</sup> 460 US 1, 24-25 (1983).

<sup>88</sup> 9 F 3d 1060, at 1063 (2d Cir 1993).

<sup>89</sup> [2002] NSWSC 896.

*c) Comparative Analysis: Arbitration Act 1996 v  
UNCITRAL Model Law*

From this foray through the issue of arbitrability as it exists in the sphere of international commercial arbitration, it is clear that there is far from accord as to the scope of arbitration on the international plane. It may be concluded that it was perhaps a sensible approach on the part of the UNCITRAL Model Law drafters to leave arbitrability to national legislators in the formulation of a definition. This brings the absence of such a delimitation under the Arbitration Act 1996 into sharp focus. Arbitrability is a threshold issue in arbitration law which may be invoked at various stages in the arbitral process. On a functional basis alone, it surely merits codification.

The difficulties of negotiating a harmonised definition at the international level cannot explain the lack of mention in the 1996 Act. The issue of arbitrability has been developed through the case law in the English jurisdiction and from the above survey, it is evident that this provides a somewhat threadbare indication of its scope. Given the restricted nature of the drafting process involved in the 1996 Act as compared with the Model Law, it is submitted that formulating a precise definition as well as clearly defining its scope would have been straightforward and, indeed, beneficial. In this sense, and bearing in mind the objective of the drafters to build upon the Model Law, this would have been an area where the Act could have



provided a better offering than the Model Law. In the Author's opinion, failure to do so represents a missed opportunity.

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The absence of definition under the UK Arbitration Act and the Model Law is problematic and is likely to become more so with the increasingly autonomous status that arbitration is gaining relative to litigation. It will be important to determine those issues which are arbitrable to ensure that arbitrators are clear on the remit of their jurisdiction. Two fundamental principles will have to be balanced in this regard. These are that issues of public interest remain subject to the public administration of justice through the courts and, also that the notion of private dispute settlement in accordance with party autonomy is upheld.

The author would propose a tripartite methodology to the issue of arbitrability at the domestic level. The first is to consider whether the parties have an arbitration agreement between them. This, as Brekoulakis has highlighted is “*a condition precedent for the tribunal to assume jurisdiction over a particular dispute*”.<sup>90</sup> It is a jurisdictional requirement. Second, the arbitral tribunal should ensure that the arbitration agreement between the parties is

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<sup>90</sup> Brekoulakis, “Arbitrability – Persisting Misconceptions and New Areas of Concern” in Loukas Mistelis and Stravros Brekoulakis eds., note 69, at 39.

valid. Given the consensual nature of arbitration, a valid agreement is critical and will equate to a contractual requirement to arbitrate. The final aspect to a determination of arbitrability is to assess whether the matter is suitable for arbitration. This will involve a calculation of both party autonomy and the public interest in the matter to be arbitrated. In this respect, the tribunal should exercise its jurisdictional discretion to refuse to decide upon those matters which, as Mistelis notes above, are manifestly inarbitrable.

The above formula, it is argued, provides a clear roadmap for arbitral tribunals to make self-determined and rational decisions as to arbitrability where this is necessary. This methodology builds upon those norms suggested by the aforementioned leading authors but, also, is inspired by an approach taken in the US frequently termed ‘Jurisdictional and Subject Matter Arbitrability’. This terminology was applied in the First Circuit Court of the US in *PainWebber Inc v Mohamad S Elahi*,<sup>91</sup> but was initially formulated in *Imports Ltd v Saporiti Italia SpA*.<sup>92</sup> In that case, the Court noted that the methodology it would use to decide matters of this nature would be bipartite. First, a consideration as to whether the parties agreed to arbitrate would be conducted. This, likewise, underlines the importance of consent in this analysis. Next, if it were indeed found to be the

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<sup>91</sup> 87 F 3d 1996 (1<sup>st</sup> Cir).

<sup>92</sup> 117 F 3d 655, 666 (2d Cir 1997).

case that the parties had agreed to arbitrate, the court would assess the scope of that agreement, specifically whether it encompassed the asserted claims. This part of the test takes into consideration the subject matter of the dispute and attempts to marry the intentions of the parties.

Indeed, arbitrability has the potential to become an issue at various points in any arbitration.<sup>93</sup> The first possible scenario is when an application is made to stay the arbitration. Here, the opposing party may claim that the tribunal lacks the authority to determine a dispute given that it is not arbitrable. Secondly, during the arbitral proceeding itself, either party may challenge the substantive jurisdiction of the tribunal. Finally, arbitrability may be raised where an application to challenge the award or to oppose its enforcement is made.<sup>94</sup> In other words, the arbitrability of the dispute is a condition of validity of the arbitration convention and therefore of the arbitrator's competence to decide the dispute and to issue a valid award enforceable at law. This underlines further the importance of determining a precise notion of arbitrability.

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<sup>93</sup> See Francis Russell, *Russell on Arbitration*, David Sutton and Judith Gill eds., (22<sup>nd</sup> Ed., Sweet and Maxwell Publishing, 2002) Arbitrability Chapter, at 15.

<sup>94</sup> For example, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, non-arbitrability is a ground for a court refusing to recognise and enforce an award.

### 3.2 Separability

For some time, the doctrine of separability was unfamiliar to English law. It is now, however, well established and this is reflected not least by its presence in the 1996 Act. As will be seen from the discussion below, the notion of separability was one of the core precepts in the Model Law and codification of the principle in the Act brings the latter into line with well-established international arbitration practice.

According to this doctrine, an arbitration clause may be separated from a contract and is taken as a distinct agreement to arbitrate. The theoretical premise on which separability is founded is based upon the primacy of party autonomy. Thus, the parties agreed that disputes would be submitted to arbitration and regardless of the status of the underlying contract - void or otherwise - this is the method of dispute resolution which should be pursued.

The object of this section is to examine the evolution of the principle of separability in English law from its common law origins to its codification in the 1996 Act. Furthermore, it is intended to consider how separability compares in its present characterisation through statute and jurisprudence to the conception of separability under the Model Law regime.

#### *a) Arbitration Act 1996 Provision: Objective Analysis*

Section 6(1) of the Arbitration Act 1996 defines the arbitration agreement as an “*agreement to submit to arbitration present or future disputes (whether they are contractual or not)*”. The agreement to arbitrate must comprise a written arbitration clause; this can, however, exist within or outside the contract. In fact, under the Act, an arbitration agreement need only be evidenced in writing - written in clear and certain terms - for example by an exchange in communication which may include letters, faxes or memorandums. This stipulation was illustrated in *Birse Construction Ltd v St David Ltd*<sup>95</sup> and it is also made clear in section 5(2) of the Act. An agreement is evidenced in writing if it is recorded by one of the parties, or a third party, with the authority of the parties to the agreement.

The Arbitration Act 1996 provides a statutory basis for the previous common law position as regards separability. The doctrine had been established in *Heyman v Darwins Ltd*,<sup>96</sup> a decision handed down by the House of Lords in 1942, in which it was held that an arbitration agreement is not determined where the underlying contract is void. It was the words of Lord Macmillan in that decision which illustrate the scope of the doctrine. “[*The arbitration clause*] survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement”.<sup>97</sup> Later, this premise was

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<sup>95</sup> [1999] 1 BLR 194.

<sup>96</sup> [1942] AC 356.

<sup>97</sup> *Ibid*, at 372.

clearly restated and developed upon in *Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co Ltd*.<sup>98</sup> In that case, the Court of Appeal confirmed that despite an underlying contract being void for illegality, an arbitration clause within that contract was separate and survived the voided contract. The arbitration clause within the contract, therefore, was capable of standing as an independent agreement. In other words, “[A]n arbitration agreement and the underlying contract need not rise and fall together.”<sup>99</sup> An arbitration agreement retains the essential characteristics of any contract, meaning that the requirements of offer, acceptance, consideration, capacity, and intention to create legal relations should all exist in any arbitration agreement. It is, however, important to point out that no separate consideration nor offer and acceptance is required for the arbitration agreement specifically. The separable clause derives its contractual nature from the (voided) underlying contract. The author submits that, in this respect, theoretical consistency is compromised in order to accommodate party autonomy.

Furthermore, in the latter case mentioned above, the Court of Appeal, removed the distinction that the House of Lords had previously asserted in the former case. In *Heyman*, the Court had distinguished between a contract which had been terminated wrongfully by one of the parties – as a result of which the

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<sup>98</sup> [1993] QB 701.

<sup>99</sup> Tweeddale and Tweeddale, *A Practical Approach to Arbitration Law*, note 13, at 74.

doctrine of separability did not apply – and a situation in which the contract was voided, whereby the arbitration clause was separable. In *Harbour Assurance* however, the claimant - the reinsurer of the six defendants under a quota share reinsurance treaty - brought an action against the defendants seeking declarations that the contract of reinsurance was illegal and void by reason of it being affected by the defendant carrying on insurance business contrary to the Insurance Companies Acts 1974 and 1981 in relation to the underlying business. The defendants denied illegality and sought a stay of the action on the ground that the parties had agreed to submit the dispute as to initial invalidity to arbitration. Holding that the dispute came within the terms of the arbitration agreement, the Court of Appeal clearly brought situations where a contract was rendered void on the basis of illegality into the scope of the doctrine. Lord Hoffmann said that the relevant questions were

*(a) whether the arbitration clause on its true construction is wide enough to embrace the dispute in question, and*

*(b) whether the issues raised impeach the separate or collateral arbitration agreement.*<sup>100</sup>

However, despite removing the aforementioned distinction, the Court in *Harbour Assurance* noted that it could differentiate

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<sup>100</sup> *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455, at 469 per Hoffmann LJ.

between a contract voided for initial illegality and one declared void *ab initio*. In the latter case, the arbitration clause could not survive. Thus, its reasoning was that it was a question of fact whether the type of illegality affected both the underlying contract and the arbitration clause.

The distinction rests upon a sound theoretical premise since a contract which is void *ab initio* can be said to have never represented the parties' intentions. On the other hand, a contract which is voided at a later date, for whatever reason, did at some point contain the agreement of the parties to submit their disputes to arbitration. Given that it is likely to be a dispute between the parties which led to a voiding of the contract, it follows that the dispute should be subject to arbitration.

It is now recognised in English law that, where parties have entered into a contract which incorporates by any reference a written form of arbitration clause, this will constitute a distinct contract from the underlying contract. The former is a contract to refer all disputes arising from the underlying contract to arbitration.

It was realised that codification of the principle was necessary in English Law and the Departmental Advisory Committee sought to achieve this in the 1996 Act. In its consideration of the Model Law's counterpart, the DAC thought the doctrine of separability ought to be distinct from the doctrine of Kompetenz-



Kompetenz. The Model Law may be distinguished in this regard from the 1996 Act, as will be demonstrated below.

Section 7 of the Act put the principle of separability on a statutory footing in the United Kingdom.<sup>101</sup> The doctrine had been in its infancy immediately prior to the drafting of the 1996 Act having only been recognised by the common law in the 1993 decision of the Court of Appeal in *Harbour Assurance v Kansa*.<sup>102</sup> Judicial opinion on the issue of separability has been somewhat varied since its enactment, however. Shackleton, conducting a review of English judicial opinions on arbitration in 2002, argued that this was one of the legal principles and paradigms whereby the position prior to the 1996 Act continued to be applied by the courts: “*A weak principle of separability remains in force despite the introduction of a strong principle at section 7*”,<sup>103</sup> and in a different commentary, noted in particular that “[c]ase law under the new regime reflects these tensions: a liberalisation of jurisdiction *ratione materiae* contrasts with the maintenance of a conservative approach to jurisdiction *rationae personae*”.<sup>104</sup>

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<sup>101</sup> Section 7 of the Arbitration Act 1996 provides: “*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*”.

<sup>102</sup> [1993] 1 Lloyd’s Rep 455; [2002] EWCA Civ 721 3 [1999].

<sup>103</sup> Stewart Shackleton, “Annual Review of English Judicial Decisions on Arbitration 2002 6(6) *International Arbitration Law Review* (2003), 220.

<sup>104</sup> Stewart Shackleton, “Challenging Arbitration Awards: Part 1 – Procedural Irregularity” 152(7058 *New Law Journal* (2002), 1816.

In *Downing v Al Tameer Establishment and another*,<sup>105</sup> the Court gave no weight whatsoever to section 7 in upholding the claimant's argument that an accepted repudiation brought to an end not only the obligation of the parties to perform the primary obligations of the contract but also the arbitration agreement contained within it. This is to be contrasted with the judgment of Mr Justice Clarke in *ABB Lummus Global Ltd v Keppel Fels Ltd*,<sup>106</sup> who opined that whether an agreement had been repudiated was a matter which could be determined by arbitration pursuant to the arbitration clause in the agreement and the arbitration agreement was not affected by the invalidity of the main agreement.

It is submitted that the earlier judgment of Mr Justice Clarke is in accordance with the terms of section 7 which provides that an arbitration agreement “*shall not be regarded as invalid, non-existent or ineffective because the other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*”. Reiterating the importance of separability in strengthening arbitral procedure, it is submitted that, the courts will need to develop a consistent jurisprudence in order to effect meaningful change in this regard. At present, the case law is confused, offering varying degrees of support for the principle of separability. As Shackleton contests: “*Pro-arbitration attitudes co-*

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<sup>105</sup> [2002] EWCA Civ 721.

<sup>106</sup> [1999] 2 Lloyd's Rep 24.

*exist with traditional conceptual frameworks that emphasise strict contractual analysis of arbitration agreements.*<sup>107</sup>

*b) UNCITRAL Model Law Provision: Objective Analysis*

The UNCITRAL Model Law at Article 16(1) sets out: “*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*”

Aron Broches has commented in respect of this provision under the Model Law: “*...separability of the arbitration clause is intended to have the effect that if an arbitrator who has been validly appointed and who stays within the limits of the jurisdiction conferred upon him by the arbitration clause concluded that the contract in which the arbitration clause is contained is invalid, he does not thereby lose his jurisdiction.*”<sup>108</sup>

This indicates a rather more complex notion of separability than that which we considered under the Arbitration Act 1996. Indeed, under the Model Law - as briefly alluded to above -

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<sup>107</sup> Stewart Shackleton, “Challenging Arbitration Awards: Part 2 - Procedural Irregularity”, 152(7058) *New Law Journal* (2002), 1816.

<sup>108</sup> Aron Broches, *Commentary on the UNCITRAL Model Law*, International Council for Commercial Arbitration Handbook on Commercial Arbitration (Supplement 11 of January 1990), at 74 to 75.

separability and competence are dealt with under the same provision: Article 16. It is section 30 of the Arbitration Act 1996 in which the competence of the tribunal to rule on its own jurisdiction is dealt.<sup>109</sup> This is as distinct from section 7 which concerns the issue of separability under the Act.<sup>110</sup> Park explains: “*Unlike the UNCITRAL Model Arbitration Law, however, the Act wisely avoids affirming separability in the same section with reference to the arbitrator’s power to decide jurisdictional questions, thus resisting the tendency to confuse these two concepts.*”<sup>111</sup>

Tweeddale and Tweeddale assert that “*the autonomy of the arbitration agreement is considered as being one of the cornerstones of the UNCITRAL Model Law*”. It is submitted, however, that if this is the case, it might have been defined in a more precise manner and under a provision dealing solely with this issue.

It is now the case that the doctrine of separability is recognised in many jurisdictions but it is important to highlight that, as well as differing in name in a number of jurisdictions (‘severability’ in the US and ‘autonomy’ in France and Germany, as well as in Italy, for example)<sup>112</sup> it also differs in form between jurisdictions. As Tweeddale and Tweeddale note “[t]he concept of separability of

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<sup>109</sup> The doctrine of competence under the Arbitration Act 1996 and the UNCITRAL Model Law will be dealt with in a later section in this thesis.

<sup>110</sup> Margaret Rutherford, *The Arbitration Act 1996 – A Practical Guide*, note 28, at 55-57.

<sup>111</sup> William P Park, *Arbitration of International Business Disputes: Studies in Law and Practice*, (Oxford University Press, 2006), at 210.

<sup>112</sup> Under the ‘autonomy doctrine’ applied in place of separability in France and Germany, courts are obliged to respect the choice made by the parties.

*the arbitration agreement exists as a matter of law and not fact*”. This divergence of notions as regards separability is likely to account for the relatively convoluted proposition that can be seen under Article 16.

*c) Comparative Analysis: Arbitration Act 1996 v  
UNCITRAL Model Law*

Notwithstanding the strong emphasis in the latter provision on the discretion of the arbitral tribunal as regards determining separability, there is one other substantive difference between the two provisions. As a brief aside, a formal point to note is that, under the UK Arbitration Act, the guarantee of separability is a non-mandatory provision and may be contracted out of by the parties.<sup>113</sup>

As regards the scope of separability under the Model Law, a consideration of the Hong Kong case *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd*<sup>114</sup> is instructive. The High Court of Hong Kong held that the doctrine is broad enough to include those contracts which are subject to a challenge of initial invalidity. This is to be contrasted with the position under English law whereby, as we have seen in *Harbour Assurance*, a

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<sup>113</sup> Under the Arbitration Act 1996, a distinction is made between mandatory and non-mandatory provisions. Those provisions which fall under the latter category may be contracted out of by the parties where they agree to do at the conclusion of the arbitration agreement.

<sup>114</sup> (1992) XVII Ybk Comm Arbn 289-304.

distinction was drawn between two species of initial invalidity. This means that an arbitration clause in a contract declared void *ab initio* may not survive. Thus, in this instance, the narrower scope of English law becomes evident as far as the doctrine of separability is concerned.

In order to garner a deeper understanding of the doctrine of separability, reference should be made to Judge Schwebel's *International Arbitration: Three Salient Problems*<sup>115</sup> in which he provides four justifications for the doctrine. These include, first, the autonomy of the parties and the pre-existence of an agreement to arbitrate. The second justification is to avoid delay in the arbitral process by ensuring that the parties do not use the void contract as an excuse to postpone proceedings. Third, there is no reason to treat an agreement in an underlying contract differently from an '*ad hoc*' agreement. Finally, in the absence of separability, courts may have to consider the entire dispute in order to determine whether there was a valid arbitration agreement, frustrating the fundamental purpose of arbitration.

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<sup>115</sup> Judge Stephen Schwebel, *International Arbitration: Three Salient Problems* (Cambridge University Press, 1987).

As is evident from the above examination, what appears at face value to be a similar notion of separability under the two legislative frameworks, actually entails subtle differences. This derives largely from the Model Law treating the concept of competence alongside the notion of separability in the same Article. Davidson offers a possible explanation for the difference: *“The Model Law presents the two as logically interdependent, whereas in logic and reality the existence of the one does not necessarily presuppose the other. Separability is not nearly as well established in international arbitration as the other concept, and the Model Law by connecting it to a particularly extensive version of Kompetenz-Kompetenz has produced a version of separability the scope of which is wider than that hitherto recognised in any legal system.”*<sup>116</sup>

Although the separability envisaged under the Model Law is likely to be broader in scope and therefore promote party autonomy to a greater extent, there is merit in Davidson and Park’s assertion that the two notions of separability and competence are conceptually distinct. For the purposes of defining the scope of separability in a clear and precise way, it is submitted that they should be treated under separate provisions.

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<sup>116</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 117.

### 3.3 Competence

It has been made clear in the previous section that separability and competence are embodied in discrete provisions under the Arbitration Act 1996 and the following quotation would appear to characterise the position under UK law as regards competence: *“Arbitrators are entitled, and indeed required, to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the court has the last word.”*<sup>117</sup>

The discourse that follows will include an examination of competence under English law and particularly, recent developments at the European Union level will be highlighted. The implications of such developments for arbitration in London will also be speculated upon. Furthermore, the nature of competence under UNCITRAL regimes will be considered and conclusions drawn as to the merits and demerits of differences with UK law in this respect.

#### ***3.3.1 Conflict of competence within the UK legal system.***

##### ***The Kompetenz-Kompetenz principle***

As emphasised before, the doctrine of Kompetenz-Kompetenz refers to the jurisdiction to determine jurisdictional matters. This

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<sup>117</sup> Lord Steyn, England's Response to the UNCITRAL Model Law of Arbitration, (1994) 10 *Arbitration International* 1, at 1.



issue is dealt with by section 30 of the Arbitration Act 1996<sup>118</sup> according to which the arbitral tribunal is permitted to rule upon its own substantive jurisdiction, subject to challenge in court. This new positive principle replaced the previous position at common law whereby the tribunal was entitled to make enquiries as to its jurisdiction but did not have the power to rule on it. This was made explicit by Lord Roskill in the case of *Willcock v Pickfords Removals Ltd*,<sup>119</sup> when he asserted: “*One thing is clear in this branch of the law. An arbitrator cannot decide his own jurisdiction*”.<sup>120</sup> The new position taken by the 1996 Act has, therefore, the merit of extending the arbitrator’s jurisdiction to matters of separability, the constitution of the tribunal and the determination of what matters have been submitted to arbitration in accordance with the arbitration agreement.

The advantage of permitting the arbitral tribunal to rule on matters of its own jurisdiction was emphasised in the DAC Report where it was noted that the application of the Kompetenz-Kompetenz principle would prevent parties from delaying “*valid arbitration proceedings indefinitely by making spurious*

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<sup>118</sup> Section 30 of the Arbitration Act 1996 provides: “(1) *Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is as to – (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement*”.

<sup>119</sup> [1979] 1 Lloyd’s Rep 224.

<sup>120</sup> *Extracted from* Ian Menzies, “1996 and all that”, Arbitration Act Special Edition (1997) *Arbitration & Dispute Resolution Law Journal*, at 198.

*challenges to its jurisdiction*".<sup>121</sup> On the other hand, however, some writers have warned of the danger of completely abolishing the jurisdiction of the courts in relation to the arbitral proceedings. They argued that since arbitration is a method of settling disputes serving as an alternative to litigation and, as it is based on the principle of party autonomy, then questions of jurisdiction should be decided by arbitrators only if the parties give them the power to do so. In other words, according to the more sceptical branch of thought, "[q]uestions of the jurisdiction of the tribunal cannot be left (unless the parties concerned agree) to the tribunal itself, for that would be a classic case of pulling oneself up by one's own bootstraps".<sup>122</sup> It is, indeed, this latter conception of competence, whereby the parties can agree to limit the jurisdiction of the arbitral tribunal in this respect, which has come to fruition in section 30 by virtue of it having a non-mandatory character under the Act.

The Arbitration Act 1996 affords the arbitral tribunal jurisdiction to rule on its own substantive jurisdiction as to three circumstances: whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the

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<sup>121</sup> Report of The Departmental Advisory Committee on the Arbitration Bill 1996, Department of Trade and Industry, Chaired by Lord Justice Saville (London, 1996) at [138].

<sup>122</sup> Saville LJ Speech at Middle Temple Hall, 8 July 1996.

arbitration agreement. These are the categories under which the case law can be broadly considered.

The determination of the validity of the agreement has been shaped by several factors. It is important to distinguish for the purposes of this analysis the notion of separability of the arbitration agreement since this concerns the validity of the underlying contract. As it has previously been emphasised, an arbitration agreement will not be considered to be valid if the underlying contract never came into existence,<sup>123</sup> *i.e.* if the contract is invalid *ab initio*.<sup>124</sup> A determination of whether the original contract came into existence is conducted using an ordinary contractual analysis. Similarly, where the arbitration agreement was induced by fraud, misrepresentation, duress or undue influence, the clause will be voidable. This is the claim that the applicant in *Irvani v Irvani* made.<sup>125</sup> However, the claimant in that case was unsuccessful in his assertion that he had been unfairly induced to enter into an arbitration agreement by his siblings. In the Court of Appeal, Buxton LJ held that there was no evidence of active undue influence. Family loyalty was thus an insufficient ground for claiming undue influence in this case.

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<sup>123</sup> *May and Butcher v R* (1934) KB 17.

<sup>124</sup> See discussion concerning the distinction made in terms of voided contracts in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* (1993) 1 Lloyd's Rep 455, *infra*, under 3.2 Separability.

<sup>125</sup> (2000) 1 Lloyd's Rep 412.

Other grounds on which an arbitration agreement may be found to be void include uncertainty; that is uncertainty as to the meaning of the arbitration agreement being so ambiguous as to be incapable of being construed to give the agreement certainty. Although courts may attempt to ascribe meaning and cure the ambiguity was evident in *Tritonia Shipping Inc v South Nelson Forest Products Corp*<sup>126</sup> and *Swiss Bank Corp v Navorossiysk Shipping*<sup>127</sup> where the courts clearly tried to give effect to the intentions of the parties. Alternatively, the case of *Altco Ltd v Sutherland* is authority for the proposition that an agreement to arbitrate is voidable where the parties have made a mutual fundamental mistake as to fact. A further area in which the validity of an arbitration agreement has come into question has been where a party denies the existence of the arbitration agreement and this denial is accepted. This question was answered in the case of *Downing v Al Tameer Establishment*<sup>128</sup> in which it was held that such a situation would entail the arbitration agreement coming to an end.

The second aspect of arbitral competence as adverted to by section 30 of the Act relates to the constitution of the tribunal. This is determined by the arbitration agreement, or where there is a lack of agreement, by the terms of the Arbitration Act. Very broad scope is given to the parties in that they may decide to

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<sup>126</sup> (1966) 1 Lloyd's Rep 114.

<sup>127</sup> (1995) 1 Lloyd's Rep 202.

<sup>128</sup> [2002] EWCA Civ 721.

constitute the tribunal in whatever manner they wish having regard to the number of arbitrators, the procedure by which they are appointed and whether there is to be an umpire or chairman of the arbitral proceedings.

The final branch of section 30 deals with the matters submitted to arbitration in accordance with the arbitration agreement. This implies that the arbitration agreement is to delimit the type of disputes that may be referred for resolution by the arbitral tribunal. Disputes falling outside of this scope, unless subsequently agreed by the parties, may not be submitted to arbitration. In *M/S Alghanim Industries Inc v Skandia International Insurance Corp*<sup>129</sup> the parties referred a dispute to arbitration which concerned whether substantial losses incurred by the claimant during the first Iraq war were covered by the insurance policies provided by the respondent. There had been an agreement between the parties to refer only this matter to arbitration as a preliminary issue. In the arbitral proceedings, the tribunal held, against Alghanim, that the claims were not covered by the insurance. Following this finding, the parties could not agree on the costs. The arbitral tribunal maintained that they had the power to tax costs. Alghanim claimed that as the award was a final award the arbitral tribunal was *functus officio*. The Court held that the arbitral tribunal at the time the award was made,

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<sup>129</sup> [2001] 2 All ER (Comm) 30.

had retained the right to deal with the taxation of costs and were therefore not *functus officio*.

It is important to bear in mind that although the arbitration agreement defines the ambit of the tribunal's jurisdiction, this may be extended by the parties at a subsequent stage, even once the arbitration proceedings have commenced. This is done via a submission agreement between the parties. A submission agreement may be concluded from an exchange of correspondence, faxes, or email. It may also be implied from the conduct of the parties. What is essential, therefore, is the objective intentions of the parties. Interestingly, a submission agreement may comprise the initial arbitration agreement. As can be seen from the case of *Westminster Chemicals and Produce Ltd v Eichholz and Loeser*<sup>130</sup> in which there was not prior arbitration agreement. Nevertheless, the parties appointed an arbitrator and participated in the arbitration. Devlin J held that an *ad hoc* arbitration agreement had arisen by the conduct of the parties.

It would appear that, on an analysis of the jurisprudence that has built up around section 30, much weight is given to the notion of party autonomy and, in particular, importance is accorded to the consent of the parties. This is admirable given that the mandate of the arbitral tribunal's jurisdiction is the arbitration agreement itself – the objective codification of the parties'

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<sup>130</sup> [1954] 1 Lloyd's Rep 99.

intentions. Thus the ambit of the tribunal's jurisdiction should reflect the intentions of the parties, even where these intentions evolve or alter over time.

### ***3.3.2 Conflicts of Competence within the European Union***

It has been asserted that “[i]t is almost impossible to avoid issues relating to conflict of laws in international commercial arbitrations”.<sup>131</sup> The issue of conflicts of competence has been the subject of deep controversy and much academic debate of late in the European Union (hereinafter “EU”). A number of recent cases have defined the contours of this area in which a distinction has been drawn in the European Court of Justice (hereinafter “ECJ”) rulings between those conflicts of jurisdiction which exist between EU Member States and those which exist between an EU Member State and a non-EU Member State. The decision of the ECJ in *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc*,<sup>132</sup> has undoubtedly provoked the most emphatic reaction, especially in England. It is fair to say, however, that although this decision shocked many lawyers, it failed to surprise them. Indeed, the European Court of Justice decision could well deprive companies of the effective “anti-suit injunction” which prevents counterparties taking legal action

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<sup>131</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 201.

<sup>132</sup> [2009] 1 All ER (Comm.) 435.

beyond the process they had contractually agreed.<sup>133</sup> Many authors went on to caution that the effect of such a move could well result in companies choosing to arbitrate in other arbitration locations outside of the EU, for example in Hong Kong or Singapore rather than in London or Paris.

In *West Tankers*, following a shipping vessel collision with a jetty in Syracuse, Italy, the insurance company for the jetty sued *West Tankers* - a British shipping company - in the Italian courts to reclaim damages it had paid to the jetty owners. Subsequently, *West Tankers* sought an injunction restraining the Italian proceedings on the grounds the lease under which it had chartered the vessel provided for the arbitration of the disputes in the UK. The relevant issue for decision in this case was whether it is consonant with EU law, specifically EC Regulation 44/2001,<sup>134</sup> for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings

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<sup>133</sup> Alex Spence, "Lawyers Fear *West Tankers* Ruling Could Harm London" 10 February 2009, *Timesonline*, available at:

<http://business.timesonline.co.uk/tol/business/law/article5703346>

<sup>134</sup> Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L12/1, "*The Brussels Regulation*". See, in particular, Article 1(2)(d) which provides that "*The Regulation shall not apply to ... arbitration*". See also paragraph 15: "*In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.*" Available at <http://eur-lex.europa.eu>.



are in breach of an arbitration agreement. Lord Hoffman MR, giving the decision of the House of Lords in that case, held that arbitral proceedings were excluded from the scope of Regulation 44/2001 and that crucially, jurisdiction on arbitral proceedings was for the parties to decide. The judge noted that there had developed a court practice in the UK of restraining foreign court proceedings where the arbitration agreement serves to promote legal certainty and reduces the possibility of conflict between the foreign judgment and the arbitral award. Further, he asserted that there was no doctrinal necessity or practical advantage which requires the European Community to handicap itself by denying its courts the right to exercise the jurisdiction to restrain foreign court proceedings.

The European Court of Justice did not agree. The Court argued that English courts should not stop proceedings in another European Union Member State even if proceedings are in breach of an arbitration agreement. In this vein, it rejected the use of anti-suit injunctions as contrary to the proper implementation of the Brussels regime and underlined that they interfered with the right of the foreign court to adjudicate upon the existence of its jurisdiction. In conclusion, the ECJ held that it was up to the Italian Court to decide whether it had jurisdiction to hear the case.

Samad has commented that a lack of meaningful analysis was given by the ECJ in *West Tankers* and this leaves the waters

muddled as to when an arbitration exclusion will operate in the future.<sup>135</sup> He points out that the effect of the decision is to introduce an unwelcome level of parity between jurisdiction and arbitration agreements which will weaken arbitration as an effective means of dispute resolution in Europe.

Alternatively, Peel highlights the difference in approach of Lord Hoffmann and the decision of the ECJ, proposing that it is purely one of emphasis. The Law Lord seeing the issue as one of private law, a contractual right, and the European Court of Justice as one of public law, the right of a member State court to determine its own jurisdiction. Although this does not account for the damage that will be done to arbitration business both in England and to other jurisdictions in Europe, it does frame an argument for judicial non-intervention. The difference in emphasis existent in *West Tankers* illustrates in part -specifically in the decision of the ECJ - the varying priorities that judges must accord when administering justice to those of arbiters when making a decision. Judges must make their decisions with the wider public interest at heart, with the interests of the private disputants only a factor to be taken into account. On the other hand, the arbiter has *only* the interests of the private disputants to consider, therefore making a confined decision purely on the issues before him. The latter reasoning is why many parties

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<sup>135</sup> Mahmud Samad, "West Tankers: A Critique" (2009) *Commercial Law Practitioner* 103.

choose arbitration and, where the circumstances are otherwise, the essence of arbitration will be damaged.

Two suggestions have been mooted as a means of reducing the “damage” that *West Tankers* has potentially inflicted upon arbitration in Europe. The first is by Samad, who poses that a possible solution is to insert liquidated damages clauses into commercial contracts.<sup>136</sup> Accordingly, a party which brings court proceedings contrary to an arbitration agreement is liable to pay damages, thus introducing a disincentive to avoid obligations to arbitrate. This, it is argued by the author, does not deal with the problem, however. It merely shifts the locus of it, placing an obligation on commercial contract drafters to insert such clauses into arbitration agreements. It is the European legislators who should remedy the situation if they are to safeguard arbitration in European Member States. In this way, Hess suggests a more robust approach. He argues for legislative reform of the Brussels Regulation following *West Tankers* to oblige foreign courts to stay proceedings in favour of the court in the Member State which is the seat of the arbitration where jurisdiction is challenged. Such a move was given life with the publication of a recent Green Paper and report entitled ‘Report from the Commission of the European Parliament, the Council and European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the

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<sup>136</sup>*Ibid.*

recognition and enforcement of judgments in civil and commercial matters'. It proposed “[p]artial deletion of the exclusion of arbitration from the scope of the Regulation [which] might improve the interface of the latter with court proceedings”.<sup>137</sup> This would allow English courts to continue to grant anti-suit injunctions for proceedings commenced in other EU Member States in breach of an arbitration clause.

Subsequent to the decision in *West Tankers*, some clarification as to its reach can be garnered from other decisions. In addition, the Ministry of Justice is currently engaged in a consultation process that has the potential to reverse the effect of *West Tankers*. On the latter, Lord Hoffmann - speaking extra judicially - has expressed the view that the Ministry of Justice is unlikely to make such a reversal, however. Instead, he urged that “[w]e’ve got to treat *West Tankers* as water under the bridge and not be obsessed by it”.<sup>138</sup>

The English courts had been restrained in their exercise of anti-suit injunctions by virtue of the ECJ decision in *Turner v Grovit*.<sup>139</sup> In that case, an exclusive jurisdiction clause prevented one of the parties to the case from instituting proceedings in

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<sup>137</sup> Report from the Commission of the European Parliament, the Council and European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Green Paper Proposal.

<sup>138</sup> Lord Hoffmann, “After *West Tankers*”, *CDR News*, 7 October 2009, available at [www.cdr-news.com](http://www.cdr-news.com) (last visited 17 January 2010).

<sup>139</sup> ECJ, judgment of 27 April 2004, Case C-159/02 “*Turner v Grovit and others*” in [2005] ICR 23 and [2004] IRLR 899.

another jurisdiction while the case was pending before an English court. The ECJ ruled that the Brussels Regulation prevented the issuing of anti-suit injunctions against the court of another Member State. English courts continued to issue anti-suit injunctions on the grounds that the Brussels Regulation did not apply to arbitration.

*Turner* meant that a party wishing to enforce a jurisdiction agreement breached by the commencement of proceedings in the courts of another Member State must first take its claim to the court first seised by way of an application to have it decline jurisdiction. *West Tankers* extends the practice to arbitration agreements. In the most recent case of *Youell v La Reunion*,<sup>140</sup> the key tenets of *West Tankers* have been confirmed by the United Kingdom's Court of Appeal.

Anti-suit injunctions create a harmonisation difficulty for the EU since their use in some Member States' jurisdictions are not possible. In the 2004 Greek case of *Piraiiki Nomologia*,<sup>141</sup> such injunctions were found to be in contravention of the Greek constitutional guarantee of access to the courts. Other jurisdictions, for example Ireland, have similarly worded provisions which, if invoked, could prevent the use of anti-suit injunctions in those countries. This would result in a situation which is likely to be at odds with the Brussels Regulation and its

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<sup>140</sup> [2009] EXCA Civ 175.

<sup>141</sup> [2004] *Piraiiki Nomologia* 92 Greek Court of Appeal.

underlying philosophy of harmonisation. The only way, it would seem, to create a level playing field within the EU is by preventing the use of the injunctions throughout the EU. In a similar vein, an interesting aspect in the case of *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and Others*<sup>142</sup> adds a further perspective to this line of argument. It was submitted by one of the parties before the House of Lords that the approach to separability adopted by the Court of Appeal in the same case infringed the owners' right of access to a court for the resolution of their civil disputes. This, it was contended, was contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Hoffmann dismissed the contention without any real analysis, merely noting that the European Convention on Human Rights<sup>143</sup> was not intended to destroy arbitration and that the parties to an arbitration can, by agreement, waive their right to a court.<sup>144</sup> This reasoning could be criticised on the basis that it is a fundamental precept of any human right that it should not be possible to contract out of it. It is a shame that the argument was dispensed with so rapidly and that reasoning was not developed further. The Author feels that such discourse could have provided an interesting further dimension to the debate over anti-suit injunctions.

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<sup>142</sup> [2007] UKHL 40.

<sup>143</sup> The European Convention on Human Rights, Rome, 4 November 1950.

<sup>144</sup> [2007] UKHL 40, at [20].

In the recent decision of *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd*,<sup>145</sup> Burton J held that the parties had agreed to arbitrate their dispute in London and the judgment which one of them had obtained from the Marseilles Commercial Court formed the basis of a claim for damages. The judge concluded “...[t]his is no more of a circumvention of the Judgments Regulation than would be an injunction to restrain the continuation of proceedings in a foreign court prior to its reaching a judgment. This is not a question of not recognising a judgment, but concluding that, as the parties were obliged to go to arbitration, it is only the outcome of arbitration which is of any relevance.”

Peel suggests that this could be the future response of the common law to the judgment in *West Tankers*.<sup>146</sup> One thing is for certain, if England is to remain at the centre of arbitration procedure on the world stage, it will have to innovate and adopt measures which keep it attractive and competitive as regards arbitral procedure. It would appear that the danger in respect of arbitral proceedings has been realised by the English judiciary, whom have been quick to pass judgment on the matter. Accordingly, the case of *Sheffield United Football Club Ltd v West Ham United Football Club plc*,<sup>147</sup> should be highlighted. In its decision, the Commercial Court found that the ECJ’s decision in

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<sup>145</sup> [2008] EWHC 2791; [2009] 1 Lolyd’s Rep. 213.

<sup>146</sup> Edwin Peel, “Arbitration and Anti-Suit Injunctions in the EU” (2009) *Law Quarterly Review* 125.

<sup>147</sup> [2008] EWHC 2855 (Comm).

*West Tankers* should not impinge upon the granting of anti-suit injunctions in respect of arbitral proceedings, as opposed to court proceedings. It was noted that the rationale of the ECJ decision, that of trust in other Member States' jurisdictions, is not relevant to the issue of restraining arbitral proceedings given that the practice does not interfere with a judicial determination on jurisdiction by a Member State's courts, thereby retaining the mutual trust. As a general comment, the English courts appear to be immediately concerned with the business of doctoring the scope of *West Tankers*, both within and outside the framework of the European Union.

### ***3.3.3 Conflicts of Competence Outside the European Union***

It is important also to consider those developments which are occurring in relation to arbitrations between parties originating outside of the European Union. The consequences of recent jurisprudence of the ECJ<sup>148</sup> do not extend to the latter category of parties who choose to arbitrate in the UK.

In *Shashoua & Others v Sharma*,<sup>149</sup> the Commercial Court provided assurance that *West Tankers* had not restricted the power of English courts to grant anti-suit injunctions where this is

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<sup>148</sup> In particular, the aforementioned case of *West Tankers*.

<sup>149</sup> [2009] EWHC 957 (Comm).



between England and a non-EU Member State jurisdiction governed by the New York Convention 1958 (which requires the courts of signatory states to stay proceedings before them, brought in breach of an arbitration agreement).<sup>150</sup> In this case, the Court was forthright in granting an anti-suit injunction preventing litigation in India in favour of England. The Commercial Court followed suit in the subsequent case of *Midgulf International Ltd v Groupe Chimique Tunisien*.<sup>151</sup>

More specifically, in *Shashona*, one of the parties contended that the ECJ's reasoning as regards the granting of anti-suit injunctions extended to other conventions and signatory jurisdictions outside of the EU. This was on the basis that the ECJ had made reference to Article II(3) of the New York Convention in *West Tankers* which makes clear that it is the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, that will refer the parties to arbitration. However, where the arbitration agreement is null and void, inoperative or incapable of being performed, such a referral will not be made.

The Commercial Court dismissed the reference that the ECJ made to the New York Convention as merely a way of demonstrating compatibility with it rather than any extension of

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<sup>150</sup> New York Convention on the Recognition and Enforcement of Arbitral Awards, Article 2(3).

<sup>151</sup> [2009] EWHC 963.

its decision. The ECJ was more concerned with the concept of mutual trust between autonomous Member States and applying the Brussels Regulation uniformly across the European Union. These rationales, the Court argued, had no application where an EU Member State granted an anti-suit injunction against a non-EU Member State. Additionally, the object of the New York Convention is to regulate enforcement and recognition and, therefore, does not detail a procedure for determining the jurisdiction of signatories at the outset of proceedings, in contrast to the Brussels Regulation which does.

In *Midgulf*, the defendant, whilst opposing an anti-suit injunction to restrain proceedings in Tunisia, adopted a similar line of argument as in *Sbashoua*, that the ECJ's decision had wider scope than simply within the European Union. Here, it was emphasised that the decision in *West Tankers* meant a restrictive approach should be taken towards the granting of anti-suit injunctions outside the EU. The Court in this case quickly rebutted the argument, determining that the exercise of caution was a pre-existing requirement when granting anti-suit injunctions.

In the light of the foregoing, it has to be argued that *West Tankers* undoubtedly marks a line in the sand for anti-suit injunctions against Member States within the EU but the above cases represent an emphatic struggle by the English courts to avoid any extension of the precedent created.

### ***3.3.4 A comparative Analysis: Arbitration Act 1996 v UNCITRAL Model Law***

Section 30 of the Arbitration Act 1996, has been formulated with the aim of balancing two different interests: (i) to give arbitrators the power to rule upon their own substantive jurisdiction in order to avoid time-consuming litigation due to spurious jurisdictional challenges before courts; and (ii) to protect the principle of party autonomy. The Kompetenz-Kompetenz principle has been introduced in the UK legal system as a non-mandatory provision which allows parties to exclude it from their arbitration agreement. This *caveat* represents the main difference existing between the Arbitration Act 1996 and the equivalent provision of the UNCITRAL Model law. It has to be emphasised that, on the one hand, Section 30 has the merit of having brought English law into line with many countries which have adopted the Model Law, but on the other hand, it is worth noting that according to Article 16 of the Model Law,<sup>152</sup> the power to rule on jurisdiction is vested

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<sup>152</sup> Article 16 of the Model Law provides as follows:

*“(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*

*For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*

*A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

*(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter*

squarely in the arbitral tribunal and parties may not agree to doctor this jurisdiction.

As a result, the legislature, through the Arbitration Act, has instilled a level of confidence in the ability of the arbitral tribunal to determine its own jurisdiction. Arguably, this is an improvement on the previous common law position as regards the doctrine of Kompetenz-Kompetenz. It does, however, fall short of the display of confidence that the Model Law demonstrates in the arbitral procedure.

Furthermore, the Arbitration Act 1996 does not have provisions which are equivalent to Articles 16(2) and 16(3) of the Model Law. In the case of the former provision, a denial of jurisdiction must be raised before, or concurrent to, a defence being served. This restricts the use of the mechanism to challenge jurisdiction to the period in which such an objection should arise and prevents its use to stall proceedings at a later stage. Under Article 16(3), on the other hand, an application to a court challenging the arbitrators' decision must be made within 30 days of the decision. This latter provision ensures that litigation

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*alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*

*(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."*

is not initiated as an instrument to cause delay in proceedings, thus preserving that crucial efficiency in the arbitral process. These further underline the importance accorded to expedited procedure under this method of dispute resolution, as well as the autonomy of the arbitration process itself, existent within the Model Law regime.

Moreover, section 30 provides for the meaning of jurisdiction, whether the tribunal is properly constituted and what matters are within the scope of the arbitration. The meaning of jurisdiction in this instance is directly related to whether there is a valid arbitration agreement. Davidson suggests “[i]t must be assumed that the reference to whether there is a valid arbitration agreement indicates that the tribunal is entitled to rule not merely where one party suggests that the agreement is invalid, but when one party denies entering the agreement at all”.<sup>153</sup> Article 16, on the other hand, outlines that the tribunal’s power to rule on its own jurisdiction permits it to consider any objection to “the existence” of the arbitration agreement.

A further difference between these legislative provisions exists which is directly on point in the present inquiry. The scope of Article 16(3) under the Model Law in respect of a court reviewing a tribunal decision as to jurisdiction is restricted whereas the counterpart section 67 is not so. Soderlund articulates concisely that “[t]he Model Law does not leave room for a

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<sup>153</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 113.

*positive finding of jurisdiction by the court (in the event that the arbitrators found themselves lacking jurisdiction)”*.<sup>154</sup> On this locus of difference, Davidson points out that “*the framers of the Model Law defended their position*” thus: “*It was recognised that a ruling by an arbitral tribunal that it lacked jurisdiction was final as regards its proceedings since it was inappropriate to compel arbitrators who had made such a ruling to continue proceedings*”.<sup>155</sup>

Davidson further notes that the matter is not dealt with by the DAC Report and it is therefore difficult to determine the rationale for the difference in the 1996 Act. He does suggest however, that recourse can be made to the decision to adopt the Model Law in Scotland where an amendment was made to Article 16(3) which allowed for an appeal against a tribunal determination that it did not have jurisdiction. It was thought, in this respect, that if the parties were informed by the tribunal that it lacked jurisdiction and thereafter resorted to litigation, one of them could petition the court (under Article 8) or refer the matter to Arbitration, which it would be bound to do if satisfied that the matter fell within a valid arbitration agreement. The Scottish Advisory Committee on Arbitration Law commented at the time “[t]his seems to be a very roundabout way to achieve a ruling by

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<sup>154</sup> Christer Soderlund, A Comparative Overview of Arbitration Laws: Swedish Arbitration Act 1999, English Arbitration Act 1996 and Russian Federal Law on International Commercial Arbitration Act 1993, 20(1) *Arbitration International* (2004) 73.

<sup>155</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 115.

*the court on whether or not the arbitral tribunal had jurisdiction*".<sup>156</sup>

Davidson asserts "[t]he situation under the Act would appear to be more akin to the Scottish position".<sup>157</sup> In a similar vein, under section 67(3)(c) the court may, as an alternative to confirming the award or setting it aside, vary it or set it aside in part on jurisdictional grounds.

On a section 67 application, the court is not limited to reviewing the award, but may rehear the jurisdictional objection, with oral evidence if necessary, nor is the evidence that can be adduced before the court limited to that submitted to the arbitral tribunal. However, Aeberli contends that if evidence is late, "it may attract a degree of scepticism and affect how the court deals with the costs".<sup>158</sup> These are archetypal examples of the Act licensing the court to meddle in arbitral proceedings. As Davidson clearly states "[t]his emphasises the fact that it is open to the court to determine the exact extent of the tribunal's jurisdiction".<sup>159</sup> Combine this fact with empirical finding that the three most litigated provisions of the Arbitration Act 1996 are sections 67, 68 and 69<sup>160</sup> and a clear picture emerges as to the extent to which, and for what purpose

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<sup>156</sup> DAC and Scottish Advisory Committee on Arbitration Law, Joint Consultative Document on the UNCITRAL Model Law 1987, at 59.

<sup>157</sup> Fraser Davidson, "The New Arbitration Act – A Model Law?" (1997) *Journal of Business Law* 101, at 115.

<sup>158</sup> Aeberli, Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map 21(3) *Arbitration International* (2005) 253.

<sup>159</sup> Fraser Davidson, "The New Arbitration Act – A Model Law?" (1997) *Journal of Business Law* 101, at 115.

<sup>160</sup> Stewart Shackleton, "Challenging Arbitration Awards: Part 2 - Procedural Irregularity", 152(7058) *New Law Journal* (2002), 1816.

the appeal procedure is utilised following an international arbitral award. Shackleton adds to this: “*Disappointed parties turn to these articles to challenge arbitral awards for lack of jurisdiction under section 67 or serious defect of procedure under section 68. The courts may be persuaded to review the legal merits of an arbitration award under section 69.*”<sup>161</sup>

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The above inquiry reveals a number of differences between the provisions which relate to arbitral tribunal competence under the respective legislative frameworks. Significantly, the UNCITRAL Model Law, as adverted to previously, considers the notion of competence under the same Article as that of separability, which, although not necessarily desirable for the purposes of clarity in legislative drafting, would appear to appeal to logic when competence is considered conceptually. The other notable difference is the scope of competence accorded to the arbitral tribunal under each. The Model Law, through its detailed provision in Article 16, offers a broader notion of competence and would appear to restrict the involvement of the court in this respect as compared to the equivalent 1996 Act provision.

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<sup>161</sup> *Ibid.* Sections 67, 68 and 69 will be dealt with later in this Chapter.



Anti-suit injunctions have been adverted to in the inquiry into the various aspects of competence and jurisdiction in the above section. This is because they had previously represented a very attractive selling point in promoting England as an arbitration-friendly centre. As has been illustrated by reference to assorted academic commentary and case law, their restriction in the EU by the recent ECJ decision in *West Tankers* could mean that dark clouds loom over the long-established reputation for favourable arbitration conditions.

The relevance of this issue to the locus of the examination in this thesis derives from that changing of arbitration conditions in the UK. The removing of anti-suit injunctions compounds the likelihood for judicial intervention in arbitral proceedings and will inevitably dissuade parties to arbitration agreements from choosing London as an arbitration centre (as well as others in Europe). Further side effects may include the undermining of arbitral procedure and arbitration as a method of dispute resolution more generally. In the case of the former, where an anti-suit injunction does not exist there is the risk of delay in the arbitration process. This is an antithesis to its fundamental advantage. The latter point is more abstract but nevertheless prevalent given the direction that the EU appears to be following. The recent cases do not vest confidence in this rapidly developing instrument of dispute resolution. Instead, they potentially encourage judicial interference and serve to shackle arbitral procedure to litigation rather than to promote it as an

autonomous and meaningful mechanism for the efficient and specialist resolution of disputes. In these recent developments, one cannot help but be reminded of the early attitude of the courts in the UK towards arbitration. The reputation that the UK developed then was sought to be remedied by the passing of legislation in an effort to restrict judicial influence and promote arbitration in the UK once again. Perhaps a renewed response is thus required.

### 3.4 Judicial Intervention in Arbitral Proceedings

The enactment of the Arbitration Act 1996 was intended to mark a departure from the traditional close supervision of the courts and to reinforce the principle of party autonomy. Lord Steyn has commented on the historical relationship between the courts and arbitration in England: “*The supervisory jurisdiction of English courts over arbitration is more extensive than in most countries, notably because of the limited appeal on question of law and the power to remit.*”<sup>162</sup>

He goes on to confirm that “*it is certainly more extensive than the supervisory jurisdiction contemplated by the Model Law*”.<sup>163</sup> But, following the consultative process engaged in by the DAC, it was decided that there would be no significant change to the law

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<sup>162</sup> Lord Steyn, “England's Response to the UNCITRAL Model Law of Arbitration”, (1994) 10 *Arbitration International* 1, at 10..

<sup>163</sup> *Ibid.*

in respect of the supervisory jurisdiction of the courts over the arbitration proceedings. Lord Steyn notes, however, that “*it became clear that further thought had to be given to the so-called special categories under section 3 of the Arbitration Act 1979 and to the ambit of the power to remit under section 22(1) of the Arbitration Act 1950*”.<sup>164</sup>

Sir John Thomas has attempted to chart the difficult balance that is involved in ensuring commercial disputes are settled in a specialised and expeditious manner but simultaneously that the principles of justice and the rule of law are applied fairly. He emphasises the need for malleability in commercial law more generally to facilitate its application to the constantly evolving requirements of international commerce: “*...the challenge of maintaining the position of the City as a leading international financial centre is a real one, what role the legal system plays is difficult for lawyers to assess, but it is not insignificant*”.<sup>165</sup> Furthermore, he notes that where the domain of commercial law does not meet needs of the City, parties choose other methods of dispute resolution such as mediation and conciliation. This indeed captures the quagmire faced by merchants for centuries. The struggle of arbitration has been to increasingly detach itself from the supervisory jurisdiction of the courts.

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<sup>164</sup> *Ibid.*

<sup>165</sup> Sir John Thomas, “The Courts of England and Wales, Commercial Education and the Changing Business of the City of London” 16(2) *Arbitration International* (2000), at 141.

The intervention of the courts in arbitral procedure, under the UNCITRAL Model Law, is limited by Article 5 which establishes that: “*in matters governed by this Law, no court shall intervene except where so provided in this Law*”. The DAC Report illustrates that the purpose of Article 5 was to “*achieve a certainty as to the maximum extent of judicial non-intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the Model Law on International Commercial Arbitration all relevant instances of court intervention*”.<sup>166</sup> One view of the Working Group on the Arbitration Act in their consideration of the Model Law was that Article 5 could “*adversely affect the positive and helpful attitude of the courts*”.<sup>167</sup> But, as is now evident in those jurisdictions which have adopted the Model Law, Article 5 provides clear guidance and restricts court intervention in the arbitral process. Improved efficiency and cost-effectiveness are thus the by-products in the Article 5 framework of judicial intervention. Peter Binder perceives, “*Article 5 can be seen as a provision useful in helping to secure the Model Law’s freedom from disruptive court interferences*”.<sup>168</sup>

On the other hand, what emerged under the Arbitration Act 1996 (see Section 1 (c)), embodied within the interpretive principles, was that courts “*should not*” intervene in arbitral

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<sup>166</sup> Report of the Departmental Advisory Committee on the UNCITRAL Model Law, note 1, at [63].

<sup>167</sup> Working Group Report on the Arbitration Bill, at [70].

<sup>168</sup> Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, (Sweet and Maxwell, 2000), at Article 5.

proceedings. This can be contrasted with the wording used in the equivalent Model Law provision - Article 5 - and also in the original Arbitration Bill, which subsequently became the Arbitration Act 1996. In each of these latter constructions, “shall” replaces “should” to give “*no court shall intervene*”. Some commentators have concluded that the effect of the discrepancy is unclear<sup>169</sup> while others note that the “*phrasing of this guideline is hortatory rather than mandatory*”.<sup>170</sup> William Park suggests that the reason for the use of the word “shall” in the Model Law is to facilitate its use in developing countries which do not have a developed legal framework as regards court intervention in arbitral proceedings. This does not, however, explain the reasoning behind the change from the Bill to the Act. To this end, Lord and Salzedo draw our attention to the account given by Professor Paul Landau at an International Business Centre conference<sup>171</sup> in 1996 to the effect that it was considered undesirable to entirely remove the courts’ inherent jurisdiction.

There are two cases which provide an insightful interpretation of section 1(c) of the Act containing the abovementioned wording. In *Vale do Rio Doce Navegacos SA v Shanghai Bao Steel Ocean Shipping Co Ltd and Sea Partners Ltd*,<sup>172</sup> it was highlighted that the

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<sup>169</sup> See Lord and Salzedo, *A Guide to the Arbitration Act 1996*, note 37, at 327.

<sup>170</sup> William Park, “The Interaction of Courts and Arbitrators in England: the 1996 Act as a Model for the United States?” (1998) *International Arbitration Law Review* 54, at 57.

<sup>171</sup> Professor Paul Landau, *New Duties and Liabilities – Party Autonomy v Powers of the Tribunal*, IBC Conference (4 July 1996).

<sup>172</sup> [2000] 2 All ER (Comm) 70.

use of the word ‘should’ in contrast to ‘shall’ in section 1(c) demonstrated a will on the part of the legislature for there to be no absolute prohibition on the court intervening in arbitral proceedings other than in those circumstances as detailed under Part I of the Arbitration Act 1996. The judge in that case considered the 1996 DAC Report in which it was noted that a mandatory prohibition on the court’s intervention in terms similar to Article 5 of the UNCITRAL Model Law was not appropriate. A similar approach is detected in the decision of *JT Mackley and Co Ltd v Gosport Marina Ltd*<sup>173</sup> in which the court granted declaratory relief outside of its powers in the Arbitration Act 1996. It is important to point out, however, that in each of these cases it was stressed that such intervention was contrary to the general intention of the 1996 Act and that the courts should usually not intervene outside the general circumstances specified in Part I of the Arbitration Act. Nonetheless, the foregoing illustrates the apparent licence granted by the UK legislature, and a willingness on the part of the judiciary, to stray beyond the boundaries defined under Part I of the Arbitration Act as well as bringing into sharp focus the implications of the subtle difference in construction between the provisions of Part I and those of Article 5 of the Model Law.

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<sup>173</sup> [2002] EWHC 1315 (TCC), 3 July 2002, Court of Appeal – Technology and Construction Court.

The Arbitration Act 1996 permits two broad mandates for judicial intervention in arbitral proceedings. The first is where provision is explicitly enumerated under Part I of the Act regarding judicial intervention. This principle of non-intervention has since been affirmed by the House of Lords, as is pointed out in *Russell on Arbitration*,<sup>174</sup> in the decision of *Lesotho Highlands v Impreglio SpA*.<sup>175</sup> In that case, Lord Steyn quoting Lord Wilberforce noted: “[i]t has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or alternatively, in the direction of correcting very fundamental errors”.<sup>176</sup>

The alternative flagged in the quote – correcting very fundamental errors - provides the second justification for judicial intervention in arbitral proceedings. This is only to occur in the most exceptional of cases to ensure that an injustice is not suffered, however. To this end, the court may intervene where the grounds for doing so do not feature in Part I of the Act.

A variety of specific powers are open to the court, generally upon application by one of the parties, but also where the court of its own accord thinks appropriate, to intervene at various stages in the arbitral procedure: before during and after. An

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<sup>174</sup> See Francis Russell, *Russell on Arbitration*, note 93, at 345.

<sup>175</sup> *Lesotho Highlands v Impreglio SpA* [2005] UKHL 43; [2005] 3 WLR 129.

<sup>176</sup> [2005] 3 WLR 129, at 138, *per* Lord Steyn.

inquiry into some of these powers of the court is conducted in the following section. Throughout, reference is also made by way of comparison with equivalent provisions under the Model Law.

### ***3.4.1 Judicial Intervention Prior to the Commencement of Arbitral Proceedings***

*“The commencement of the arbitration is the first formal step that a claimant must take and in many regards is the most important”.*<sup>177</sup> The authors of this quote highlight the significance attached to the modalities by which a dispute is commenced. Where notice of the initiation of proceedings is given this may be defective where it falls outside of the terms of the arbitration agreement: for example a time limit set for bringing disputes to arbitration. Where this is the case, the claimant will find that the notice has no effect and, fundamentally, no remedy. Tweeddale and Tweeddale point out that the claimant will therefore have to *“consider the content of the notice of commencement and the time when that notice needs to be served.”*<sup>178</sup>

There are two formal instances whereby a court may intervene in arbitral proceedings prior to their commencement. First, judges may extend the power of arbitrators to decide the dispute after the expiry of the time limit agreed by contract in order to

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<sup>177</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 261.

<sup>178</sup> *Ibid.*



commence an arbitral proceeding (this is the case when a contract includes a contractual time bar clause that provides a limitation on claims being brought after this time).<sup>179</sup> Second, courts have the power to make orders regarding the appointment of an arbitrator when one of the parties refuses to participate in the process. In both cases, the court intervention will assist the arbitration process when there is a deadlock situation due to (i) the expiry of the time limit to commence proceedings contractually agreed by the parties; or (ii) the inertia of one of the parties (generally the defendant).

*a) Power to extend time limits*

Under the Arbitration Act 1996, the courts are vested with a power to extend time limits for the commencement of arbitration proceedings under sections 12(1) and (3) of the Arbitration Act 1996. Section 12 provides that where an arbitration agreement sets a time limit for the referral of a dispute to arbitration, this shall be upheld unless the claimant can show that either of two steps were taken: that they sought to begin arbitral proceedings, or, that they began other dispute resolution procedures which had to be exhausted before arbitral

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<sup>179</sup> Contractual time bars seek to curtail the statutory time limit for bringing a claim. There are a number of international commercial contracts which provide for the barring of a claim if the claim is not made within a specified time. For example, claims under the Centrocon arbitration clause require that any claim must be made and the claimant's arbitrator appointed within three months of final discharge. Alternatively, the normal statutory period for commencing claims under the English Limitations Act is 6 years from the date of the breach.

proceedings could be initiated. An order may be made by the court in this respect whether or not the time limit that was originally agreed between the parties has expired. The order does not affect the operation of the Limitations Acts.<sup>180</sup>

Alternatively, a court may extend the time limit where it is satisfied that the circumstances are such as to be outside the reasonable contemplation of the parties when they agreed the original time limit, where to do so would be just, or, where the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

It is generally required that such an application be made to court only as a last resort and certainly not where arbitral resolution is possible. With this in mind, the courts have tended to take a pragmatic non-interventionist approach. This is evident in the case of *Marc Rich Agricultural Trading SA v Agrimex Ltd.*<sup>181</sup> That case concerned an appeal to the Court on a point relating to an assertion of a time bar which would preclude the granting of an award. The Court held that it was for the arbitral tribunal to decide whether to extend the time for commencing the arbitration and it was not for the Court to intervene at this stage.

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<sup>180</sup> Limitations Act 1980. The underlying rationale of the statute of limitations is that a defendant should be spared the injustice of having to face a stale claim. With the passage of time cases become more difficult to try and the evidence which might have enabled the defendant to rebut the claim may no longer be available. Furthermore, it is in the public interest that a person with a good cause of action should pursue it within a reasonable period.

<sup>181</sup> [2000] EWHC 193 (Comm).

An application of the provision under the previous Arbitration Act is illustrated by the case of *Consolidated Investment and Contracting Co. v Saponaria Shipping Co. Ltd.*<sup>182</sup> A contract provided that the concerned ship owners would be free of all liability if arbitration proceedings were not commenced within one year of the delivery of cargo from the cargo holders. A dispute arose between the cargo holders and the ship owners. However, the cargo holders did not commence arbitration proceedings due to the fact that they had been assured by the ship owners' insurance company that the dispute would be resolved. In the circumstances, the Court of Appeal held that they would extend the time whereby the cargo holders could commence arbitration proceedings.

It occurs to the Author that such a power could be better suited to the arbitrator rather than the courts, even though in reality recourse to the courts is a last resort. The reasoning for such an assertion is threefold. First, it concerns the issue of jurisdiction to hear a case, therefore, by the doctrine of *Kompetenz-Kompetenz*, could be delegated to the arbitral procedure. An arbitrator is better suited because they have a more adept understanding of the circumstances of the case at hand and the commercial context to make such a determination. Secondly, courts will not be able to offer the same efficiency that an arbitrator is able to offer in terms of giving a decision on the

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<sup>182</sup> [1978] 1 WLR 986.

extension of time limits. Further, in a similar vein, should such power be devolved to the arbitral process, this would ease the burden on the judiciary, freeing up valuable time and increasing judicial efficiency in terms of litigation. Third, where the parties have agreed to settle disputes via arbitration, this is the procedure that should be followed. A dispute over time limits is no different from any other dispute which is likely to arise under the contract, and to the Author, an argument to settle such a dispute in court does not carry much weight.

In this respect, it has to be emphasised, however, that the Arbitration Act 1996 is more detailed than the UNCITRAL Model Law. The latter legislative framework is silent on the issue of time limits and the power of courts (or for that matter arbitrators) to extend them. It is submitted that although the provision in the Arbitration Act is not perfect, the UNCITRAL regime is unsatisfactory in this regard as it leaves much uncertainty as to the circumstances in which time limits set in arbitration agreements may be extended.

#### *b) Discretion to Appoint an Arbitrator*

Under section 18 of the Arbitration Act 1996, a court may exercise discretion in appointing an arbitrator. The relevant part provides: *“If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.”*

The section then details the various permutations of the court's powers in respect of appointments. Although the section has the potential to be broad in scope given that disagreement between the parties as far as appointment of an arbitrator is concerned, it seems likely that "*the recent trend has been for the court to favour party autonomy unless to do so might fundamentally undermine the arbitral process*".<sup>183</sup> This is therefore an example of an admirable judicial attitude towards a power which it has over a consensual dispute resolution procedure. Perhaps just one air of caution should be noted having reference to the appointment of an arbitrator. It is likely to be crucial to the success of the arbitral process that an arbitrator is chosen whom both parties can agree is a good compromise and in which they can trust and respect.

Nevertheless, this is an example of the court intervening in the arbitral process in a positive way, supporting the continuance of an arbitral procedure where a dispute over the appointment of an arbitrator threatens to be the death knell in a given arbitration. The court therefore has the power to give directions as to the making of any necessary appointments, direct that the tribunal shall be constituted by such appointments as have been made, revoke any appointments already made or make any necessary appointments itself.<sup>184</sup> The appointment by the court of an arbitrator is treated as if it was done so by agreement of

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<sup>183</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 499.

<sup>184</sup> See section 18(3) of the Arbitration Act 1996.

the parties and the arbitration should continue in the expected manner.

The position as delineated by the Arbitration Act 1996 is to be preferred to the position prior to the enactment of that Act. Previously the court had on occasion refused to appoint arbitrators where there had been inordinate and inexcusable delay. The case of *R Durnell and Sons v Secretary of State for Trade and Industry*<sup>185</sup> marks a line in the sand. In that case, although the court noted that it could – as in the jurisprudence which had preceded the 1996 Act – refuse a remedy to a claimant who had for a long time neglected to take the required steps, it asserted that the means to settle the dispute which resulted in a fair and efficient resolution of the dispute should be that which prevails. If this entailed appointing an arbitrator to facilitate the arbitral process, then this course should be pursued. “*The court considered that the exercise of the court’s residual discretion would depend on the circumstances of the particular case*”.<sup>186</sup> Further evidence of the courts supportive attitude may be seen in the case of *Atlanska Plovidba v Consignaciones Asturianas SA*, in which Moore-Bick disagreed with the earlier courts finding in *Durnell* noting that, “...*whereas the ability to reach a fair resolution of the dispute goes to the heart of the arbitral process, delay and expense do not, unless they are so serious as to undermine that fundamental requirement*”. As can be seen from this

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<sup>185</sup> [2000] BLR 321.

<sup>186</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 634.

quotation, the judge's reasoning is squarely focused on party autonomy and respect for the arbitral process.

Such provision is far from novel, however, and it has been stated that “*default provisions for the appointment of the arbitral tribunal are found in almost all municipal legislation*”.<sup>187</sup> It is therefore not surprising to find that provision is made under the UNCITRAL Model Law. This may be found in Article 11. First and foremost, party autonomy is at the heart of this provision in that it sets out clearly that parties may agree as to the appointment procedure to be adopted. Where there is a failure to agree between the parties, this may be conducted by the court upon agreement of the parties, the existing arbitrators or another competent authority.

There are significant differences in the wording of the two provisions. Under the Arbitration Act, section 18 clearly delimits the powers of the court in its appointment of arbitrators. For example these are stated as follows:

- (a) to give directions as to the making of any necessary appointments;*
- (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;*
- (c) to revoke any appointments already made;*
- (d) to make any necessary appointments itself.*

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<sup>187</sup> *Ibid.*, at 140.

Whereas under the Model Law, Article 11 is more concerned with the qualification of the arbitrator that the court ultimately selects.<sup>188</sup> Even in the first subsection of that Article, it is given that: “*no person shall be precluded by reason of his nationality from acting as an arbitrator*”.

Although the former would appear to define the scope of the court more precisely, it may in reality allow the court to go further than envisaged under the Model Law. In this respect we

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<sup>188</sup> Article 11 of the UNCITRAL Model Law provides

“(1) *No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*

(2) *The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*

(3) *Failing such agreement,*

(a) *in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;*

(b) *in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.*

(4) *Where, under an appointment procedure agreed upon by the parties,*

(a) *a party fails to act as required under such procedure, or*

(b) *the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or*

(c) *a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

(5) *A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.”*



must also bear in mind the underlying philosophy of the two legislative frameworks which has been alluded to earlier. In particular, that the Model Law provides under Article 5 that no court “shall intervene”. Where the Model Law is silent, one may therefore speculate that the court will not intervene in such circumstances. Furthermore, under the Arbitration Act it is specifically provided that the appointments already made may be revoked. Coupled with the foregoing philosophy, it is hard to imagine that such would be permitted under the Model Law.

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Although under both of these areas, the Arbitration Act would appear to go further and provide much greater detail, it is submitted that the former is nevertheless likely to permit greater court intervention prior to the commencement of arbitral proceedings. In respect of time limits and the discretion to appoint arbitrators, an UNCITRAL court is likely to be restricted from exercising discretion beyond the terms of the Model Law, particularly having regard to the underlying tenets of this legislative framework.

### ***3.4.2 Judicial Intervention During Arbitral Proceedings***

Under this section the forms of judicial intervention once the arbitral proceedings have been commenced will be examined, as before, under both the Arbitration Act and the UNCITRAL Model Law. In particular, the assistance that the court can provide to the arbitral tribunal in the form of interim measures as well as the staying of legal proceedings and controversial inherent jurisdiction of the court to intervene will be considered in some depth.

*a) Providing Assistance to Arbitral Proceedings*

In accordance with section 44 of the Arbitration Act 1996, a court is entitled to support an arbitration in certain enumerated ways. Those circumstances include the taking of the evidence of witnesses, the preservation of evidence, making orders relating to property which is the subject of the proceedings, the sale of any goods the subject of the proceedings or the granting of an interim injunction or the appointment of a receiver. Apart from the final two of the aforementioned powers, all the powers given to a court in respect of these circumstances may also be exercised by the arbitrator. This may be particularly useful, for example, where it is necessary to make an order over property which belongs to a third party but is nevertheless implicated in the proceedings. Ordinarily, an arbitrator's powers are confined

to property which is owned by, or in the possession of, a party to the proceedings.<sup>189</sup>

Section 44 is a non-mandatory power and the parties to an arbitration agreement may elect to exclude it. It is notable that it applies even where the seat of the arbitration happens to be outside England or if no seat has been selected. However, the court may not exercise its powers if it believes that it would be inappropriate where the seat is designated as outside of England.<sup>190</sup>

It is also worth noting that there has been some divergence between the original intention of the manner in which these provisions should be applied as conceived by the DAC and the way in which they have actually been applied by the courts. For example, in *Hiscox Underwriting Ltd v Dickson Manchester & Company Ltd*<sup>191</sup> the court decided to interpret section 44 in a less restrictive way than had been advocated by the Departmental Advisory Committee. The latter's Report had asserted that the power of the court to intervene in cases of urgency was limited to the preservation of assets of evidence. Cooke J argued that on an interpretation of the words in the provision, the court has a wider latitude since the language was permissive rather than prohibitive.

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<sup>189</sup> Section 38(4) of the Arbitration Act 1996.

<sup>190</sup> See Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 715.

<sup>191</sup> [2004] EWHC 479 (Comm).

Section 44 offers a voice of support for the arbitral proceedings in that under section 44(5) the applicant must satisfy the court that the arbitral tribunal has no power to make the order required. It is submitted that this is in line with the notion that section 44 is intended to be supportive of the arbitral function rather than stifling of arbitral procedure. As Rutherford and Sims point out, “...*the court’s powers are therefore supplementary to the arbitrator’s powers and the intention is that they should be exercised only where, for any reason, the arbitrator is unable to exercise them effectively*”.<sup>192</sup> Furthermore, an order under section 44 may be sought where the arbitral tribunal has not yet been constituted. However, once the arbitral tribunal has been fully constituted, the court may return control of the proceedings to the tribunal. The court may then order that any orders it had made whilst awaiting the proper constitution of the arbitral proceedings shall cease to have effect subject to an order of the arbitral tribunal. This latter power is provided for under section 44(6) of the Arbitration Act 1996.

An example of a court order given prior to the constitution of an arbitral tribunal is evident in *Belair LLC v Basel LLC*,<sup>193</sup> whereby the Commercial Court granted an order for interim relief under the 1996 Act. Its reason for doing so was to preserve the assets involved in the case – a palace in Georgia –

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<sup>192</sup> Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 150.

<sup>193</sup> [2009] EWHC 725 (Comm).

pending the outcome of an arbitral tribunal which had yet to be fully constituted. It was therefore, to use the language of section 44(5) of the 1996 Act, unable to act effectively and thus judicial assistance was permissible.

This provision is a case in point of court powers being curtailed in comparison with the previous position under section 12 of the Arbitration Act 1950. Judicial power to order security for costs and for the amount in dispute have been omitted. It is now for the arbitrator to order such security subject to the parties' agreement otherwise. One might argue that this leaves vulnerable parties potentially exposed where an inexperienced arbitrator overlooks such an order. The corollary of such an oversight would obviously be disadvantageous for the non-defaulting party left to cover the costs incurred by the tribunal. Further, there would appear to be no power for either an arbitrator or court to order security for the amount in dispute.<sup>194</sup> This leaves a rather significant vacuum in securing that a just outcome is achieved by the arbitral tribunal. It may be envisaged that where, for example, companies implicated in proceedings are close to insolvency or are being wound up, a party seeking compensation may find themselves without a remedy.

Nevertheless, Rutherford and Sims urge that the overriding spirit of this section is captured by the presence of many

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<sup>194</sup> Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 151.

safeguards which are provided “...to ensure that the court does not officiously intervene in matters which should be within the arbitrator’s province, in accordance with the principle as to court intervention set out in s 1(c) [of the Arbitration Act 1996]”.<sup>195</sup> A prime example of this, as well as being an assertion of confidence in the arbitral tribunal itself, is that of section 44(6) of the Act. This gives the arbitrator a power to order that an order of court made under section 44 ceases to have effect. Indeed, “[t]hat an arbitrator or organisation may terminate the effect of an order of court is an entirely new concept and illustrates the radical nature of the thinking behind so much of this Act”.<sup>196</sup> The sentiment expressed by the section reflects the intention that the court should intervene in arbitral proceedings only insofar as it is required to ensure that they function effectively.

#### *b) Staying Legal Proceedings*

In order to avoid a party frustrating the arbitral proceedings by invoking court proceedings, both the Model Law and the Arbitration Act provide for a stay on legal proceedings. Article 8 of the Model Law outlines that if a matter before a court is the subject of an arbitration agreement, the court on the application of any party must refer them to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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<sup>195</sup> *Ibid.*, at 152.

<sup>196</sup> *Ibid.*, at 153.

Davidson points out that the aforementioned formula “*might appear quite familiar as it is drawn from Article 2(3) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and in turn appeared in section 1(1) of the Arbitration Act 1975 – which aimed to give effect to the Convention within the United Kingdom*”.<sup>197</sup>

In the original 1975 English Arbitration Act,<sup>198</sup> an additional ground for refusing a stay was provided for. This meant if there was, in fact, no dispute between the parties with regard to the matter to be referred, the court could refuse to grant a stay. However, this further element cannot be found in the 1996 Act since, as the DAC asserted the provision was “*confusing and unnecessary*”.<sup>199</sup> This brings UK arbitration law into line with both the New York Convention and the Model Law in this respect.

In the Act, a differentiation which has long existed in English arbitral legislation remains. The Act differentiates between domestic and non-domestic agreements. Where agreements are non-domestic, the UK’s treaty obligations demanded that a stay should be automatically granted where there was a valid arbitration agreement in operation. On the other hand, where a domestic agreement is at issue, a court must grant a stay unless it

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<sup>197</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 103.

<sup>198</sup> Section 1 of the Arbitration Act 1975.

<sup>199</sup> Report of the Departmental Advisory Committee on the UNCITRAL Model Law 1989, note 1, at [55].

is satisfied that there are sufficient grounds for not requiring the parties to abide by the arbitration agreement. It is therefore still possible to be refused a stay in relation to domestic arbitration agreements. Davidson highlights that “*the Act gives no indication what is meant by “sufficient grounds”, and indeed this deliberately vague phrase is employed to cover the many and various instances where the courts have felt able to refuse a stay*”.<sup>200</sup> The provision does not accord with the guiding philosophy of party autonomy and judicial non-interference. In this respect, even the DAC posited : “*...consideration should be given to abolishing [the distinction between domestic and non-domestic arbitration agreements] and applying the New York Convention rules to all cases...[which] fit much more happily with the concept of party autonomy than our domestic rules, which were framed as a time when attitudes to arbitration were very different and the courts were anxious to avoid what they described usurpation of their process.*”<sup>201</sup>

Despite this forthright assertion, the DAC did not, however, recommend for the distinction existent within the domestic and non-domestic frameworks to be abolished. The above quotation captures the problems which such a distinction creates in terms of both party autonomy and enabling judicial intervention at a lower threshold than is permitted by the respective Model Law provision under Article 8. Furthermore, it facilitates the

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<sup>200</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 103.

<sup>201</sup> Report of the Departmental Advisory Committee on the UNCITRAL Model Law 1989, note 1, at [320].



possibility that a party wishing to delay arbitral proceedings, has an avenue to do so in the case of a domestic agreement by instigating litigation in an attempt to prove that there are sufficient grounds for not requiring the parties to abide by the arbitration agreement.

*c) Inherent Jurisdiction of the Court*

*“Parties, however, sometimes conduct themselves in such a manner as to induce the Court of Chancery to restrain them from proceeding in a reference”.*<sup>202</sup> The controversial power of the court to intervene in the context of UK arbitration remains and Aeberli articulates: *“...the court retains its inherent jurisdiction to determine, by declaration and injunction, an arbitral tribunal’s jurisdiction at any time and irrespective of whether the party seeking such relief satisfies the requirements for recourse to the court under sections 32, 67 or 72 of the 1996 Act.”*<sup>203</sup> Similarly, Blanch points out that: *“it is not possible to entirely exclude the court’s role with wording in an arbitration agreement”.*<sup>204</sup>

First, section 32 of the Act enables the court to determine the jurisdiction of the arbitral tribunal following an objection by one of the parties that the tribunal lacked substantive jurisdiction under section 31. The former provision is mandatory in nature

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<sup>202</sup> Francis Russell, David Sutton and Judith Gill *Russell on Arbitration*, note 98.

<sup>203</sup> Aeberli, “Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map” 21(3) *Arbitration International* (2005) 253.

<sup>204</sup> Blanch, “Interim Measures in International Arbitration and The UK Courts – The Current Position”, 6(5) *International Arbitration Law Review* (2003) 161.

under the Act and represents an alternative route for the party seeking to challenge the jurisdiction by determination as a preliminary point as opposed to determination by the tribunal itself. Tweeddale and Tweeddale point out that where this avenue is followed, “[i]t will, in such circumstances, be quicker and cheaper to proceed by this route rather than proceed *ex parte* to an award, which would thereafter be challenged”.<sup>205</sup> The requirements for an application under this section, in an attempt to preserve the principle of Kompetenz-Kompetenz, are relatively stringent. They include that an application is made with the agreement in writing of all the parties to the proceedings or, alternatively, with the permission of the tribunal and where the court is satisfied that determination is likely to produce substantial savings in costs, that the application was made without delay, and that there is good reason why this matter should be decided by the court.<sup>206</sup> It should also be noted that a further option remains for a party after the award, by way of a challenge to the substantive jurisdiction of the tribunal in accordance with section 67 of the Act.

The following discourse embodies an attempt to chart the development of this doctrine through the case of the UK courts and its current state within the framework of the Arbitration Act 1996.

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<sup>205</sup> Tweeddale and Tweeddale, *A Practical Approach to Arbitration Law*, note 13, at 78.

<sup>206</sup> See section 32(2) of the Arbitration Act 1996.

The common law cases of *Sneddon v Kyle*<sup>207</sup> and *Ontario Danforth Travel Centre Ltd. v British Overseas Airways Corporation*<sup>208</sup> are early authorities for the proposition that the court has an inherent jurisdiction to restrain arbitration proceedings where it would be right and just to do so. This may occur, for example, where the claimant has been guilty of inexcusable and inordinate delay that a fair hearing is impossible. At common law, therefore, a court hearing a case is able to dismiss the claim for want of prosecution.

The issue of the inherent jurisdiction of the court to deal with a delay of prosecution was dealt with in England in the leading case of *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd.*<sup>209</sup> The plaintiffs in that case claimed that arbitration proceedings in which they were respondents had been prejudiced by the delay of the defendants in prosecuting the arbitration. Thus, they sought an injunction restraining the defendants from continuing with the arbitration and a declaration that the arbitrator had the power to strike out the claim. The Court had to answer the question as to whether it had jurisdiction to restrain a party from continuing with the arbitration. At first instance, Donaldson J held that an injunction for restraint of arbitral proceedings could be granted. He argued that the prejudice that the plaintiffs suffered as a result of the

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<sup>207</sup> (1902) 2 S.R. (N.S.W.) Eq. 112.

<sup>208</sup> (1972) 29 D.L.R. (3d) 141.

<sup>209</sup> [1981] 2 WLR 141.

delay was very serious which entitled the Court to order the defendants to desist from taking any further action in purported pursuance of the arbitration agreement. He also noted that the Arbitrator had the same power as a court to dismiss a claim for want of prosecution, unless the parties agreed to curtail the arbitrator's jurisdiction.

The case was subsequently appealed to the Court of Appeal and the House of Lords, in which the decision was not overturned. The Court of Appeal underlined that claimants in an arbitration are under a duty not to delay and where this happens, the respondents were entitled to treat this as a breach of the arbitration agreement. In the House of Lords, Lord Denning MR giving the decision of the Court, in no unclear terms asserted that it be recognised that arbitrators are impotent and thus it was only the court that could bring the party to book. The Arbitration Act 1979, then in force in England and Wales, provided for courts to make orders enforcing arbitration orders.

This issue has been the subject of some discourse through a number of cases subsequent to the enactment of the 1996 Act, which will presently be considered. It is interesting in this respect to examine whether there has been a change in attitude on the part of the courts given the different guiding philosophy that the 1996 Act advocates. In *ABB Lummus Global Ltd v Keppel*

*Fels Ltd*,<sup>210</sup> the Court held that section 1(c) of the Act prevented it from determining the jurisdiction of the tribunal, unless the requirements under section 32 were fulfilled. The case that followed was *Vale de Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd*, which although considering the former case, refrained from following it. The Court held that the restriction on court intervention in section 1(c) was not, like Article 5 of the Model Law, expressed as an absolute prohibition. It therefore did not remove the court's inherent power to consider jurisdictional issues surrounding arbitral proceedings. The Court suggested that, in the alternative, the provision expressed the general intention that the courts should not usually intervene except under the parameters of Part I of the Act. However, it is notable that the Court nevertheless refused to intervene under its inherent power as it asserted that it had not been the intention of Parliament to permit such an intervention.

In *FT Mackley & Co Ltd v Gosport Marina Ltd*,<sup>211</sup> the Court accepted that section 1(c) did not exclude the court's inherent power to grant declaratory relief in respect of a question concerning the tribunal's jurisdiction. The requirements for the section 32 application had not been met and ordinarily it should have been the arbitral tribunal which determined the

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<sup>210</sup> [1999] 2 Lloyd's Rep 24.

<sup>211</sup> [2002] BLR 367.

jurisdictional question. In this case, albeit reluctantly, the Court determined the application for a declaration as it argued that the question was of general importance and, in addition, as the answer to that question had implications for validity of the reference to arbitration.

Very recent cases are indicative of positive support for the arbitration process, evident particularly in *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and Others*.<sup>212</sup> In that case, the Trial Judge refused an application for a stay of arbitral proceedings. This decision was upheld on appeal to the Court of Appeal which held that the dispute did not fall within the arbitration clause and section 7 of the 1996 Act required an arbitration clause to be treated as a distinct agreement. Latterly, Lord Hoffmann in the House of Lords determined that the construction of the arbitration clause should be considered in an assessment of whether the parties had intended a matter to be excluded from arbitration. He highlighted that the principle of separability applied and that the agreement to go to arbitration could only be challenged on grounds relating directly to that agreement. The arbitration agreement contained nothing to exclude disputes on the challenged grounds. The legal proceedings for rescission and the appeal were therefore dismissed.

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<sup>212</sup> [2007] UKHL 40.

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It is submitted that the latter judgment of Lord Hoffmann represents a pragmatic and desirable attitude towards the meaning of the arbitration agreement. His words demonstrate a respect for the agreement between, and the autonomy of, the parties to arbitration. It is a welcome development upon the decision of Lord Denning MR in *Bremer VulkanSchiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd*, especially in the sense that it appears to instil a confidence in arbitral procedure and the decisions of arbitrators. Furthermore, it is likely to aid in that necessary preservation of efficiency in the arbitration process by constricting the opportunities for challenge in the courts. To this end, *Fili Shipping* represents a significant and positive change in the approach of the court to the exercise of its inherent jurisdiction to intervene in arbitral proceedings. Although this jurisdiction to intervene in arbitral proceedings has been carved out by the courts themselves, there would appear to be emerging a more deferential attitude towards arbitration on the part of the courts in its application. It remains, in contrast to the Model Law, however, within the remit of the judge to restrain arbitral proceedings which, in theory at least, represents a significant power over arbitral proceedings with no significant restraints.

### ***3.4.3 Judicial Intervention After Arbitral Proceedings***

This aspect of judicial intervention represents the most contestable interference in arbitral procedure. From a critical perspective court interference at this stage necessarily entails an undermining of the meaning of arbitral awards. Where parties are able to challenge, appeal or overturn the outcome of an arbitration, the finality and currency that such an award is compromised. On the other hand, one may take the view, as the DAC Report of 1996 that, “[e]nforcement through the court provides the classic case of using the court to support the arbitral process”.<sup>213</sup> The relative merits and demerits of court interference after the conclusion of arbitral proceedings will henceforth be examined.

The level and form of review for arbitral awards varies between jurisdictions. Three broad frameworks of review for arbitral awards by courts can be distinguished however:

- (i) a right to appeal matters related to both points of law and procedural fairness;*
- (ii) a right to challenge an award only for defects of procedural integrity in the arbitration; and*

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<sup>213</sup> Report of The Departmental Advisory Committee on the Arbitration Bill 1996, Department of Trade and industry, Chaired by Lord Justice Saville (London, 1996) at [273].



(iii) *no judicial review at all.*<sup>214</sup>

The majority of leading arbitral centres adhere closely to the second model but there are a number of notable exceptions: England and Switzerland may be cited as examples in this regard. In the former jurisdiction, parties to arbitration are permitted to opt out of judicial review on the legal merits of the case. In Switzerland, a novel framework is adopted allowing parties to choose between the three regimes.

Given that a court may reject the enforcement of an award under the Arbitration Act 1996, it is the judiciary that, in effect, have final sanction over the arbitration. For an award to have any practical value it must be enforced in accordance with summary proceedings under section 66 of the Arbitration Act 1996. In the alternative, it may be enforced by bringing an action on the award in court.

More specifically, section 66 provides that the leave of the court is required to enforce an award just as a judgment or order of the court is. The court will not grant leave where it is shown to be defective or invalid. Furthermore, summary proceedings may be stayed pending the determination of an appeal or challenge to the award as is provided for by the 1996 Act. In this way, the

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<sup>214</sup> William Park, "The Interaction of Courts and Arbitrators in England: the 1996 Act as a Model for the United States?" (1998) *International Arbitration Law Review* 54, at 56.

court exercises its final supervisory role. This, it is strongly argued, precisely leads to that undermining of an award made as a result of an arbitration. A great deal of interference from the court is required to give the arbitral award any value which severely weakens the armoury of this independent method of dispute resolution.

In the subsections that follow under this head, these fundamental aspects of arbitration - execution, enforcement and challenge of an arbitral award - will be considered under both the Arbitration Act and the UNCITRAL Model Law.

*a) The nature of the award*

Before analysing the power of the court's intervention for the enforcement of an arbitral award some remarks should be made on the nature of the award. Tweeddale and Tweeddale highlight the scarcity of definition as far as awards are concerned: "*The term 'award' is one that permeates municipal arbitration legislation, arbitration rules, treaties and conventions. However, it is a term that is often not defined*".<sup>215</sup> This is indeed true for the UNCITRAL Model Law, International Chamber of Commerce ("ICC") Rules of Arbitration and broadly for the Arbitration Act 1996. The aforementioned authors point out that only two rule-systems

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<sup>215</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 327.

attempt meaningful definitions. These are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the Singapore International Arbitration Act 1994. The former is unhelpful given that it simply states “[t]he terms ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted”.<sup>216</sup> Section 2(1) of the Singapore International Arbitration Act, however, provides that an award (including an interim award) is a decision on the substance in dispute. The importance of distinguishing an award from other orders made by the arbitral tribunal is fundamental since in many countries the arbitration laws accord different powers to courts as regards awards or orders.

Despite this lack of definition, it is section 48 of the Arbitration Act 1996 which details the remedies that are available to the arbitral tribunal. These remedies may constitute the substance of the award. A basic distinction made in the section is between declarations and orders. A declaration may be given by the arbitral tribunal determining any matter in the proceedings. This in effect gives the arbitrator the power to decide the meaning of a contractual provision. The declaration may also form part of the substance of the award where a declaratory award is sought. Alternatively, the arbitral tribunal may make an order. This could be in the form of an order to pay money, an injunction, specific

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<sup>216</sup> Article 1.2 of the New York Convention.

performance or the ratification, setting aside or cancellation of a deed or document. Interestingly, there is no equivalent provision in the UNCITRAL Model Law and it is submitted that this is a prime example of the prescriptive nature of the Arbitration Act as opposed to the more open-textured Model Law.

*b) The Execution of the Award*

Once an award has been made by an arbitral tribunal, there is no guarantee that it will be carried out by the party on which it is incumbent. It may be necessary for the party whom the award is made in favour to have it enforced against the other party. This can only be done through national courts. It is interesting to note, however, that “[a]lthough there is no statistical proof it appears that most arbitration awards are carried out voluntarily”.<sup>217</sup> Where this is not the case, the enforcing party must seek enforcement in the place where the other party has assets to make an order seizing those assets to the value of the award. Therefore, enforcement may not always take place in the jurisdiction under which the arbitration took place.

An English arbitration award may be enforced by an action in the courts, or by a summary procedure under section 66 of the Arbitration Act 1996, by an originating summons made *ex parte*

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<sup>217</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 408.

asking for leave of the court. A foreign arbitration award on the other hand, may be enforced in England in a number of different ways. First, there is a procedure at common law for enforcement, that is by securing an English judgment. Secondly, if the award falls within the New York Convention, as enacted into English domestic law by the Arbitration Act 1996,<sup>218</sup> the Washington Convention of 1965,<sup>219</sup> or the Geneva Convention on the Execution of Foreign Arbitral Awards 1927,<sup>220</sup> the position for the claimant is the same as for the domestic claimant. Third, if it has been made enforceable by a foreign judgment, an action on that judgment may be sought in the courts. Fourth, if it was made in a country to which the Administration of Justice Act 1920, Part II, or the Foreign Judgments (Reciprocal Enforcement) Act 1933 extends, the arbitral award is treated as if it were a judgment rendered by a court in that country. Finally, if it was made in another part of the United Kingdom (other than England or Wales) and is enforceable there as a judgment, it is enforceable by registration in England.<sup>221</sup>

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<sup>218</sup> Part III, Arbitration Act 1996.

<sup>219</sup> Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, 18 March 1965, Washington.

<sup>220</sup> Convention on the Execution of Foreign Arbitral Awards, 26 September 1927, Geneva.

<sup>221</sup> This breakdown of circumstances for foreign judgment enforcement is helpfully enumerated in John Greenwood Collier, *Conflicts of Laws* (3<sup>rd</sup> Ed., Cambridge University Press, 2001), at 179.

As previously mentioned, as regards the execution of an English arbitration award, section 66 of the Arbitration Act 1996 provides for a summary procedure which can be initiated by any Parties to the arbitral proceedings who is willing to seek a court enforcement of an award. This provision is analogous in substance to that of Article 35 under the Model Law. Within the framework of section 66, parties may seek an order to enforce the award as if it were a judgment of the court and to this end may have the award entered as a judgment. Accordingly, an application must be made to the court for leave to enforce the award and, in the case of an award not being fulfilled, the remedies where a judgment of the court is not complied with will be available to the parties enforcing the award. It is worth noting that section 66 embodies a mandatory rule and parties, therefore, are not permitted to contract out of this enforcement provision even where they agree in the matter.

An enforcement order can be made to apply to the whole award or just part of it, including any interest or costs that may be owed. One proviso applies, however. In the case of *Walker v Rowe*,<sup>222</sup> it was held that the Court was not entitled to include within its enforcement order interest on the award where the arbitral tribunal had failed to include this within its award.<sup>223</sup> It is

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<sup>222</sup> [1999] 2 All ER (Comm) 961.

<sup>223</sup> See Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 872. Also note *Cadoroll Pty Ltd v Mauntil Pty Ltd* [2000] ACTSC 79 in which an Australian court refused to amend a mathematical mistake made by the arbitral tribunal.

therefore not permitted to make good a part of a defective award made by the arbitral tribunal.

The cases of *Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer*,<sup>224</sup> and *Delta Civil Engineering v London Docklands*<sup>225</sup> aid in the identification of a shift in the burden of proof as regards enforcement procedure. They illustrate that the previous common law position was that the enforcing party had the onus of proving that there was a valid arbitration agreement and that the arbitral tribunal had jurisdiction. This has changed somewhat as the burden of proof now rests upon the party seeking to prevent enforcement to show why the award should not be enforced, but only following some formalities being completed by the enforcing party. Presently, under the Arbitration Act and the Civil Procedure Rules, the enforcing party must demonstrate before the court that the arbitration agreement and the award are valid. Then, that party must state in the application to the court that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

This subtle shift in the burden of proof through the jurisprudence of the courts represents an underpinning of the importance accorded to arbitral awards and is further evidence of the supportive role that the courts can play in ensuring that

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<sup>224</sup> [1954] 1 QB 8.

<sup>225</sup> [1997] 81 BLR 19.

the integrity of arbitral tribunals is maintained from beginning to end.

*c) Challenging or Appealing the Award*

The Arbitration Act provides that an award may be challenged or appealed on the grounds of: (i) lack of jurisdiction under section 67; (ii) serious irregularity of the proceedings or substantial injustice suffered by a party in accordance with section 68; and (iii) substantive breach of law, under section 69.

On the other hand, the UNCITRAL Model Law, namely Article 34, provides for an arbitral award to be set aside in certain circumstances mainly different from those established by the Arbitration Act. More specifically, an arbitration agreement can be appealed not only on the ground of the lack of substantive jurisdiction on the part of the arbitrators (Article 34(2)(a)(iii)), but also in order to challenge (i) the incapacity of one of the parties to enter into an arbitration agreement (Article 34(2)(a)(i)); and (ii) the infringement of the public policy of the State where the award is made (Article 34(2)(b)(ii)).

All that established, in the following paragraphs the provisions under each legislative framework will henceforth be examined with a view to determining which least undermines the value of an arbitral award.



Section 67 of the Arbitration Act 1996 allows a party who contests that an award was made by a tribunal which did not have jurisdiction, to appeal the award **for lack of substantive jurisdiction**. According to this rule a party may apply to the court:

*“(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or*

*(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.”*

Section 67 of the Arbitration Act is a mandatory section, which parties cannot set aside on the basis of a mutual agreement. According to this rule, parties may challenge either the arbitral tribunal's ruling because it lacked jurisdiction; or its award on the merits - on the ground that it did not have jurisdiction - and apply for an order declaring the award to be of no effect, in whole or in part.

Referring to the matters laid down in section 30(1) of the Arbitration Act 1996, section 82 enumerates the specific circumstances in which arbitrators may lack substantive jurisdiction. These include, (1) where there is an invalid arbitration agreement, (2) where the tribunal was not properly constituted, and (3) where matters submitted to arbitration did

not fall within the scope of application of the arbitration agreement.

It is worth noting that this provision differs from that laid down in section 32 in that the former gives the party the right to appeal the award for lack of jurisdiction only after the award has been issued, while the latter refers to the power of courts to make a determination of a preliminary point of jurisdiction, pending an arbitral proceeding.<sup>226</sup> In that regard, it has to be pointed out that section 67 can be used also to challenge a preliminary award issued by the tribunal during the proceedings in order to decide on the objection raised by a party as to the tribunal's substantive jurisdiction, under section 31(4) of the Arbitration Act 1996.<sup>227</sup> This, to some extent, contravenes the principle of *Kompetenz-Kompetenz* given that it leaves a determination of jurisdiction *ex post facto* to the courts. However, this assertion may only be made in a strict theoretical sense,

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<sup>226</sup> According to section 32 “ (1) *The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. [...]* (4) *Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending;* (6) *The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.*”.

<sup>227</sup> According to section 31 “(1) *An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. [...]* (4) *Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may— (a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits. [...]* (5) *The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).*”.

since, in reality, recourse will always be necessary where the arbitrator makes an erroneous decision on jurisdiction at the outset of proceedings.

The second primary ground on which an award may be challenged is where a **serious irregularity** exists. This is provided for under section 68 of the Arbitration Act 1996.<sup>228</sup> This rule generally reflects the position as it was set out under sections 22(1) and 23 of the Arbitration Act 1950 and also under Article 34 of the Model Law. Despite that there still exist important differences in respect of each of the aforementioned provisions.

The scope of the grounds for serious irregularity have, in fact, been narrowed under the Arbitration Act 1996. More specifically, under the previous Arbitration Acts 1950-1979, an award could be, more generally, remitted back to the arbitral tribunal where a deficiency in procedure had occurred. This happened in the case of *Indian Oil Corp v Coastal (Bermuda) Ltd*,<sup>229</sup> in which an arbitration was requested to deal with an argument which had not been submitted to it in the pleadings or during the hearing. Further, a discussion of the change features in the

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<sup>228</sup> Section 68 of the Arbitration Act 1996 sets out a non-exhaustive list of nine circumstances which may constitute a serious irregularity as detailed below in this section.

<sup>229</sup> [1990] 2 Lloyd's Rep 407.

House of Lords judgment of *Lesotho Highlands Development Authority v Impregilo SpA and Others*,<sup>230</sup> in which the Law Lords describe that “[t]he sweeping generality of the provision [under the 1950 Act] is clear...[and]...in the eighties and nineties there was persistent criticism about the excessive reach of these powers of intervention”.<sup>231</sup>

Conversely, the Model Law makes no reference to serious irregularity under its equivalent provision: *i.e.* Article 34. Instead it provides an exhaustive list – in contradistinction to the non-exhaustive list under section 68 - of those limited circumstances whereby an award may be set aside.

Returning to the 1996 Act, an award can be challenged before courts, on the ground of section 68, where there is a serious irregularity in relation to the arbitrator’s conduct at any stage in the procedure or as to the issuing of the award. “Irregularities”, according to section 68(2), can include: (a) failure by the tribunal to comply with section 33 (general duty of tribunal), (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction), (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties, (d) failure by the tribunal to deal with all the issues that were put to it, (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers, (f) uncertainty or ambiguity

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<sup>230</sup> [2005] UKHL 43.

<sup>231</sup> [2005] UKHL 43, at [26].

as to the effect of the award, (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy, (h) failure to comply with the requirements as to the form of the award, or (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties in relation to the proceedings or the award.

The nine circumstances outlined above serve to illustrate that Section 68 provides a comprehensive list of situations whereby a serious irregularity may be said to arise. The prescriptive nature of this provision suggests that outside of these circumstances, there exists very little scope to challenge an award on the ground of this legal basis. This is supported by the 1996 Report of the DAC, which highlighted that “*Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.*”

A further ground for challenging an award is that of **substantial injustice**. The DAC set out the test for substantial injustice as follows: “*The test of ‘substantial injustice’ is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such*

*a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice.*<sup>232</sup>

As is plainly evident from this piece, a strong emphasis on the need to maintain party autonomy is fundamental to the arbitral process. It recommends that the courts take a qualified approach and that the judiciary respect the choice made by the parties to the arbitration. Such an endorsement is to be admired and it is hoped that the courts, in applying this test, act with the restraint that is expected of them. The Author would advocate for this test to be applied to other provisions of the Arbitration Act 1996 which allow for judicial intervention in arbitral proceedings given that it is likely to remind judges of the importance in maintaining respect for party autonomy when matters concerning arbitration reach the forum of litigation.

The final way in which an award may be challenged is on a **point of law**. This is facilitated under section 69 of the 1996 Act. The reasoning for including a restricted right of appeal in this way was provided by the 1996 DAC's Report: *"It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example,*

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<sup>232</sup> Report of The Departmental Advisory Committee on the Arbitration Bill 1996, Department of Trade and industry, Chaired by Lord Justice Saville (London, 1996), at [280].

*many arbitration agreements contain an express choice of law clause to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with force that in such circumstances, the parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fails to do this, it is not reaching the result contemplated by the arbitration agreement.*<sup>233</sup>

Although such a provision may seem appropriate, it has not been met with universal acceptance. Holmes and O'Reilly question the value of section 69, noting that it “*adds little to the cause of justice or the development of the law. As well as being contrary to the spirit of party autonomy...it is a source of cost and inefficiency*”.<sup>234</sup> The right to appeal on a question of law under section 69 is indeed broad in scope and it could be viewed as a key disincentive for arbitration in England. Parties may, however, opt out of this provision, and indeed if they choose to arbitrate in one of the leading institutions (for example the London Court of International Arbitration) the parties must, in accordance with the rule-systems, of those institutions, waive their right to appeal. This nevertheless leaves parties to *ad hoc* arbitration most exposed to an extensive appeals process unless the provision is expressly opted out of.

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<sup>233</sup> Report of The Departmental Advisory Committee on the Arbitration Bill 1996, Department of Trade and industry, Chaired by Lord Justice Saville (London, 1996), at 285.

<sup>234</sup> R Holmes and M O'Reilly, “Appeals from Arbitral Awards: Should Section 69 be Repealed?” 69 *Arbitration* (2003) 1.

Tuckey J in *Egmatra AG v Macro Trading Corporation*,<sup>235</sup> recognised that Article 69 was broad and warned that the courts should exercise it sparingly so as to “*respect the decision of the tribunal of the parties’ choice*”. The underlying principle which should be applied in respect of this provision was articulated by the Court of Appeal in *BMBF (No 12) Ltd v Harland v Wolff Shipbuilding and Heavy Industry*:<sup>236</sup> “*it is not for the courts to substitute its own view for that of experienced arbitrators on questions such as this*”. Although these comments of the judiciary represent a sensible approach as regards the application of section 69, they also serve to indicate the potential that the provision has for undermining the decisions and awards of arbitrators.

However, it is submitted that the remit of section 69 would appear to represent an area where judicial intervention is justified given that it concerns an aspect upon which judges are pre-eminently qualified and are likely to offer more expertise than an arbitrator. As the DAC emphasise in their reasoning, “*...the parties have agreed that the law will be properly applied by the arbitral tribunal*” and where this does not occur, it is for a court to resolve the issue and restore justice in the case. It would seem that, in practice, the fine balancing act required in the exercise of this power is achieved by the judiciary. Remarks made by Steyn LJ in *Geogas SA v Tammo Gas Ltd*<sup>237</sup> are testament to this

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<sup>235</sup> [1999] 1 Lloyd’s Rep 862, at 865.

<sup>236</sup> [2001] 2 Lloyd’s Rep 227.

<sup>237</sup> [1993] 1 Lloyd’s Rep 215.



assertion: “*The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be*”.<sup>238</sup>

The circumstances in which section 69 is invoked extend to where the proper law of the contract is a foreign law, where the parties have chosen a foreign law as the procedural law and where there arises a question of fact. In respect of the first circumstance, Tweeddale and Tweeddale note that a question of law under a foreign law is a question of fact under the law of England and Wales and cannot be the subject of an appeal under section 69 of the Arbitration Act 1996.<sup>239</sup>

In the case of the second scenario, where a foreign law is chosen as the procedural law then this will mean that the non-mandatory provisions of the Arbitration Act 1996 are removed in the same way as if the parties had explicitly agreed not to include them. An appeal cannot then be brought on a question of law under section 69 of the Arbitration Act 1996 if the foreign law excludes the right of appeal. Reference should be

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<sup>238</sup> [1993] 1 Lloyd's Rep 215, at 227 to 228.

<sup>239</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 877.

made to Section 4(5) of the Arbitration Act 1996 in this respect, which provides: “...*the choice of law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter*”.

Questions of fact comprise the final dimension of this provision. Whether an event has occurred or not, or whether an allegation is proven or not, is a question of fact and is considered having regard to the evidence presented in a case. Tweeddale and Tweeddale use the example of a situation in which it is to be determined whether there has been a breach of contract and whether a loss has been incurred due to the breach of contract.<sup>240</sup> As is evident from the cases of *Fence Gate Ltd v NEL Construction Ltd*<sup>241</sup> and *Hallamshire Construction plc v South Holland DC*,<sup>242</sup> an arbitral tribunal’s award cannot be challenged under section 69 of the Arbitration Act 1996 on the basis that it has made an error of fact.

It is a stipulation in accordance with this section that a question of law in an appeal must result from a *valid* award. In *Baytur SA v Finagro Holding SA*,<sup>243</sup> the arbitration proceedings had been terminated as one of the companies involved had ceased to exist.

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<sup>240</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 877.

<sup>241</sup> [2001] All ER (D) 214.

<sup>242</sup> [2003] EWHC 8 (TCC).

<sup>243</sup> [1991] 4 All ER 129.

An award was made after the termination of proceedings but this was held to be invalid and therefore a question of law could not arise from it.

A further requirement pertains to this section. The question of law must arise from the *arbitration award*. The difficulties of such were alluded to by Judge Thornton in *Fence Gate Ltd v NEL Construction Ltd*,<sup>244</sup> “it is never easy to define what is meant by a question of law in the context of an arbitration appeal”.<sup>245</sup> Tweeddale and Tweeddale note that “...it may not be the same as a question of law in a case of judicial review”.<sup>246</sup> Generally, a question of law concerns the interpretation of legal principles such as, they exemplify, whether a tenancy is an assured tenancy or a secured tenancy, or the construction of a contractual term.

In the alternative, where an arbitral tribunal does not account for certain factors in its reasoning or where it confuses law and fact, this may lead to an error of law. In *Fence Gate Ltd v NEL Construction Ltd*, Judge Thornton cautioned that where the latter occurs – a confusion of law and fact – this could lead to an error of principle and thus a question of law is likely to arise in this instance. The learned judge further warned that the discretion given to an arbitral tribunal must not be used in a way which is contrary to the intentions of the parties who have conferred

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<sup>244</sup> [2001] All ER (D) 214, per Thornton J.

<sup>245</sup> [2001] All ER (D) 214, per Thornton J at [38].

<sup>246</sup> Tweeddale and Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, note 40, at 803.

such power on it, and also in accordance with the law. Moreover, it must not be exercised in a manner in which a reasonable arbitration tribunal properly directing itself could not have reached. In that decision, a workable analogy was drawn with the review standards expected of an administrative body, that is the *Wednesbury Principles of Reasonableness* and those of an appellate court in its exercise of judicial discretion at a lower judicial level, that is the *Birkett v James Principles*. This is what is expected of the arbitral tribunal in its exercise of powers and the question of whether the arbitral tribunal adhered to these principles is a question of law. This is because it raises a question of jurisdiction or a question as to the correct exercise of an arbitral tribunal's powers in accordance with the law.

*“The trend in legal systems around the world has been towards immunising the award from challenge on the ground of error of law”.*<sup>247</sup> The 1996 Act does not restrict a right of appeal on a point of law where the parties agree to this beforehand or where a court grants leave under section 69(2)(b) to make an appeal. As Stewart Shackleton comments *“[m]aintenance of this recourse sets England apart from UNCITRAL Model Law jurisdictions”*.<sup>248</sup> The court will grant leave where it is satisfied that the determination of the question of law concerned could substantially affect the rights of the parties. In

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<sup>247</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 122.

<sup>248</sup> Stewart Shackleton, “Challenging arbitration awards: Part 3”, 152(7058) *New Law Journal* (2002), 1816.

this respect, the 1996 Act does not represent much of a development upon the 1979 Act in that no significant restriction is placed on the right of appeal where all parties agree to such an appeal proceeding. Fraser Davidson notes, “[u]nder the 1979 Act the courts had played their role in restricting the availability of appeals, and certain provisions in the new Act simply cast judicially articulated principles in legislative form”.<sup>249</sup> It should be emphasised that the 1979 Act represented a compromise however, between two competing schools of thought as regards the development of English arbitration law. First, there were those that asserted that the unrestricted right to demand a special case was damaging London as a centre of arbitration. Second, there existed a converse opinion that the courts continued to develop the jurisprudence in this area to ensure a concrete commercial law foundation in the United Kingdom. To this extent, the 1979 Act charted a course between these competing points of view. By extension, therefore, the 1996 Act reflects this compromised position and serves only to provide a halfway house on the matter of challenging an award on the merits. Furthermore, in 2002, Shackleton commented that the transition has been far from smooth: “[t]he regime of appeals on the legal merits of arbitral awards is under pressure because the legal theory that sustained it under former arbitration regimes has all but disappeared.”<sup>250</sup>

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<sup>249</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 123.

<sup>250</sup> Stewart Shackleton, “Annual Review of English Judicial Decisions on Arbitration 2002” 6(6) *International Arbitration Law Review* (2003) 220.

As has been noted, it is possible for the parties to agree to exclude an appeal to the court under certain conditions. Davidson sketches an insightful foundation for this major reform of English law.<sup>251</sup> The Commercial Court Committee Report recommended the retention of a wider right of appeal in relation to such disputes on the basis that “*there is no evidence of any widespread desire to be able to contract out of a right of judicial review and that such a right is very important to the maintenance of English law as the first choice in international commerce*”.<sup>252</sup> The Report had recommended that the right of appeal should be included in respect of certain disputes for a limited period of time on the view that the then temporary and abnormal increase in the number of parties wishing to contract out derived only from the abuse of the pre-1979 special case procedure. It was thought that once sufficient time had passed for the superiority of the new system to be appreciated, parties would come to support an entrenched right of appeal. Davidson points out that this has not happened.

As it has been previously noted, under Article 34 of the **UNCITRAL Model Law**, an arbitral award can only be set aside in limited circumstances. These include the incapacity of one of the parties to enter into the arbitration agreement (Article 34(2)(a)(i)), the lack of substantive jurisdiction on the part of the

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<sup>251</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101, at 123.

<sup>252</sup> The Commercial Court Committee Report, at [48].

arbitrators (Article 34(2)(a)(iii)), and the infringement of the public policy of the state where the award is made (Article 34(2)(b)(ii)).

Critically, the UNCITRAL Model Law does not contain any general right to appeal an arbitral award for substantive error of law. This is to be contrasted with the respective provision of the Arbitration Act 1996, which provides strong support for the notion of an appeal on a point of law.

Some reasoning may be offered in this respect. The Model Law is designed to accommodate international commercial arbitration where it is very likely that neither the parties nor their dispute will have any connection with the state which provides the forum for the arbitration, and the governing law may equally not be that of the forum State. Thus the Model Law provides that awards may only be challenged on grounds which are regarded as appropriate in the context of international commercial arbitration. An appeal under section 69 of the Arbitration Act 1996, however, may be challenged on a question of law as distinguished from a question of fact. Taner Dedezade posits that “[t]his distinction is notoriously difficult to draw and arises in almost all areas of law when it comes to a question of appeal”.<sup>253</sup> Similarly, Shackleton has emphasised the controversy which surrounded

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<sup>253</sup> Taner Dedezade, “Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law” 9 *International Arbitration Law Review* 56.

the enactment of this particular provision at the time of the drafting of the 1996 Act and highlights that the appeal regime is fraught with tension: “*Confusion surrounds the demarcation of a question of law for the purposes of appeal. Implementation continues to be problematic. The legislative objective of reducing appeals from arbitrators’ awards has not been met; the largest single category of arbitration-related litigation continues to involve appeals on the legal merits of arbitral awards.*”<sup>254</sup>

As an interesting rejoinder to the present discussion, it is notable that during its involvement in the drafting of the Model Law, the United Kingdom expressed reservations concerning the scope of the grounds upon which an award could be challenged. It argued that the Model Law should set a minimum level of judicial control in the arbitral process but, this does not necessarily entail “...*that the Model Law must set a maximum, eliminating even those means of judicial control which the parties themselves desire to retain*”.<sup>255</sup>

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The focus of the above comparison has been placed on the appeal on a point of law. The Arbitration Act facilitates this

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<sup>254</sup> Stewart Shackleton, “Challenging Arbitration Awards: Part 3”, 152(7058) *New Law Journal* (2002), 1816.

<sup>255</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” *Journal of Business Law* (1997) 101, at 125



procedure by virtue of section 69. As highlighted, this remedy is not available to parties within the UNCITRAL framework. Since the relevant provision under the 1996 Act has a non-mandatory character, where the parties agree that they will have no power to challenge the award on a point of law, the position under each piece of legislation is essentially the same. It is submitted, however, that recourse to appeal on a point of law does not necessarily undermine the arbitration proceedings, it rather encourages arbitrators to apply the law accurately. Indeed, it should be remembered that judges are the most qualified arbiters when it comes to the application of the law and are better suited to this task. However, given the importance that is laid on arbitrator's qualifications in their appointment where this is not done so by agreement of the parties under the Model Law, perhaps it may be suggested that the lack of appeal on a point of law is tempered somewhat by the more thorough vetting of arbitrators at the outset. Thus, an error of law is less likely to occur in the first place.

#### **4 RECENT TRENDS IN INTERNATIONAL COMMERCIAL ARBITRATION: AN EMPIRICAL ANALYSIS**

The object of this section is to trace the development of arbitration in terms of its popularity and contours of regulation through a statistical analysis. Furthermore, an important part of this empirical study will comprise a consideration of the success of arbitration both from the perspective of the legal regimes in which it is facilitated and, in addition, from those who engage with the rule-systems in commerce. In addition, the rule-systems which serve to regulate arbitration will be the focus of some reflection and speculative inquiry.

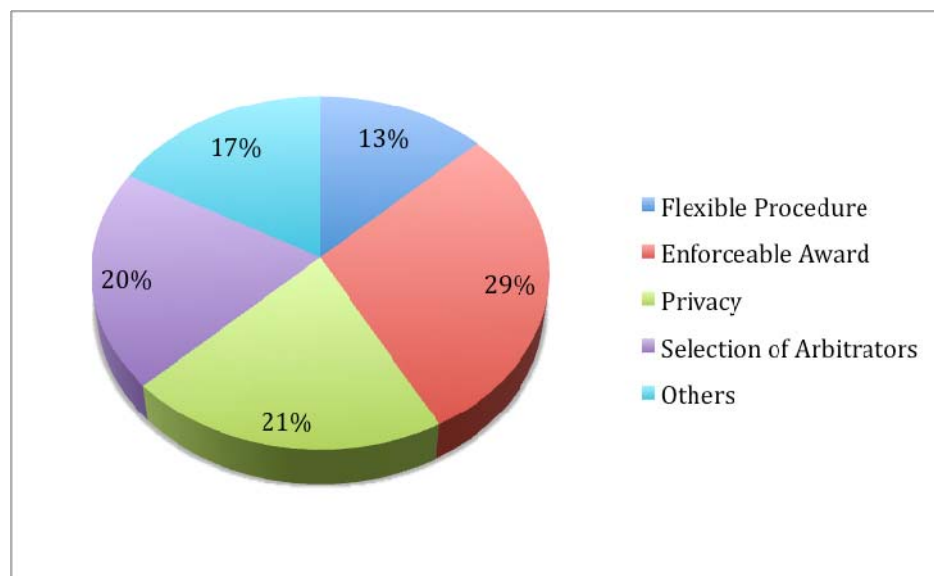
A number of studies conducted by various sources will be utilised throughout this analysis in order to establish the features of an optimal legislative framework for arbitration in the UK. It is important to point out in the introduction to this section that research conducted by Professor Loukas Mistelis illustrates recent trends in international arbitration.<sup>256</sup> As a general remark, the overriding consensus from a surveyed group of companies was of a preference for international arbitration over litigation. In fact, 89% of the respondents said they would opt for arbitration and/or alternative dispute resolution. Only 11%, on the other hand, would consider international litigation for the

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<sup>256</sup> Professor Loukas Mistelis, “International Arbitration – Trends and Challenges” (available at [www.adrmeda.org](http://www.adrmeda.org)).

resolution of international disputes. This trend, it is submitted, is explicable by the reasons adverted to at the beginning of this work which embody the fundamental advantages of arbitration over litigation. The research by Mistelis confirms the postulate that arbitration is the dispute resolution mechanism of choice in international commerce. To this end, Gerald Aksen comments, “...in today’s world the dispute resolution mechanism will invariably be arbitration”.<sup>257</sup> The following pie chart ranks these important reasons for choosing arbitration, as viewed by the companies that participated in the Mistelis’ survey.

### Most Important Reasons in Selecting Arbitration



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<sup>257</sup> Gerald Aksen, “Arbitration and Other Means of Dispute Settlement” in David N Goldsweig & Roger H Cummings eds., *International Joint Ventures: A Practical Approach to Working with Foreign Investors in the US and Abroad* (2<sup>nd</sup> Ed, American Bar Association, Chicago, 1990), at 287.

As is evident from the pie chart, the most important reason in selecting arbitration is an enforceable award. It is difficult to use this as a factor in distinguishing arbitration from litigation since the latter may be used as a way of enforcing the former. Once an arbitral tribunal has made its award, this then binds the parties and important legal consequences ensue. If the award is not carried out voluntarily, it may be enforced by legal proceedings - both locally (in the place in which it was made) and internationally.<sup>258</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 is the most significant treaty in the international sphere of arbitral awards. This outlines the procedure to be followed for recognition and enforcement of foreign arbitral awards, whilst specifying limited grounds on which recognition and enforcement of such awards may be refused by contracting states. Redfern and Hunter posit that “[t]his Convention was one of the first of a series of major steps taken by the United Nations since its inception to aid in the development of international commercial arbitration”.<sup>259</sup> Indeed, the Convention has achieved widespread acceptance and these authors go on to point out that: “Most major trading nations of the world have become parties to the New York Convention. [In 2004, the Convention had] more than 130 signatories, including less-developed as well as developed countries. In particular, several Latin American states (such as Argentina, Columbia, Mexico and

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<sup>258</sup> Alan Redfern and Martin Hunter, *The Law and Practice of Commercial Arbitration*, note 4, at 11.

<sup>259</sup> *Ibid.*

*Venezuela) and Arab states (such as Egypt, Kuwait and Saudi Arabia) are parties to the Convention.*<sup>260</sup>

Suffice it to say, the New York Convention has been successful in providing an international framework which harmonises national legislative systems and facilitates widespread arbitration. The corollary of this regime is that it provides peace of mind for those parties who are successful in arbitral proceedings that their awards will be enforced in the other party's jurisdictions. The effect of such is undoubtedly healthy for international trade.

The Author submits that, like the UNCITRAL Model Law, the framework of the New York Convention is skeletal. It provides a fundamental structure, outlining the key elements to be included in a national law for successful regulation of international arbitration but, at the same time, enables the national legislature and judiciary sufficient scope to tailor an arbitral regime which meets a jurisdiction's specific arbitration requirements. The New York Convention is applied by national courts in respect of any arbitral award where enforcement is sought. As Redfern and Hunter note: *"The procedure to be followed in enforcement, the time-limits to be observed, the way in which the conventions are to be interpreted and other relevant factors are all matters*

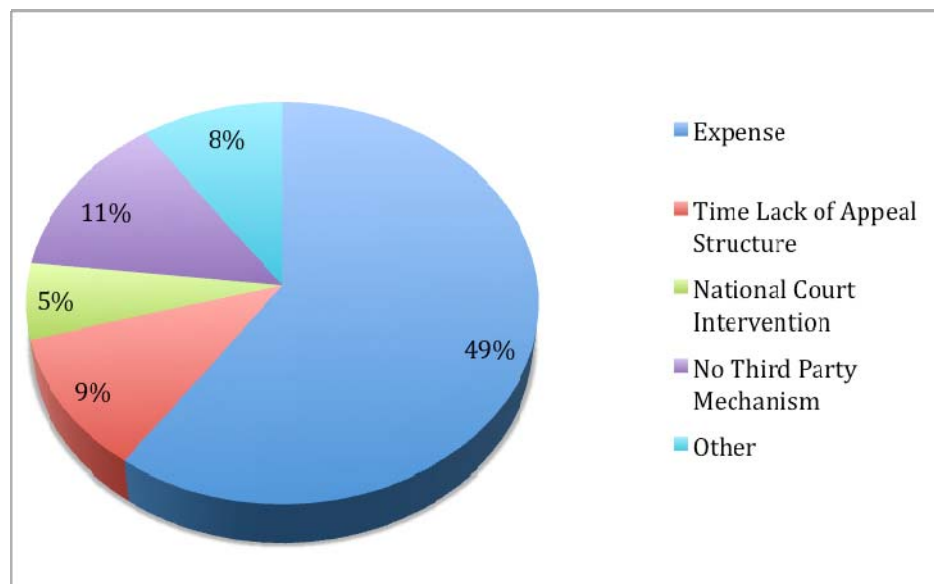
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<sup>260</sup> *Ibid.*

*which fall to be determined by the law of the country in which recognition and enforcement of a particular award is sought.*'<sup>261</sup>

Other factors which were cited by those participating in the survey included privacy, the possibility for the selection of arbitrators and a flexible procedure. These values are the preserve of arbitral proceedings and cannot be offered by the counterpart dispute resolution mechanism that is litigation. It is pertinent to suggest that any court intervention in the arbitral process would, relatively speaking, serve to undermine these values.

### Top Disadvantages About Arbitration



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<sup>261</sup> *Ibid.*

Also charted from Professor Mistelis' research are the top disadvantages of arbitration, as cited by the same companies. It will be important to consider the reasons which may turn certain parties away from arbitration to ensure that in a consideration of any legislative framework, the extent to which the disadvantages are minimised is analysed.

For the purposes of the present inquiry it is notable that although court intervention is cited as a disadvantageous factor of arbitral proceedings, it is in fact the least troubling of the four specified disadvantages. On this point, Professor Mistelis simply comments that: "...court intervention is possible before, during and after the arbitration proceedings but there is not much an arbitration tribunal can do to control or limit such interventions. In many cases, however, modern arbitration statutes, such as the UNCITRAL Model Law, specifically limit court intervention."<sup>262</sup>

The most significant disadvantage of arbitration, according to the research, is expense. Indeed, arbitrations have become more expensive but this is in part, it is suggested, due to increased judicial influence in the arbitral proceedings. Inevitably, where court intervention is decreased the cost of the overall proceedings both in terms of minimising delay and legal fees will be reduced.

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<sup>262</sup> *Ibid*, at 14.

As the National Arbitration Forum Report highlight, the traditional view is that; “*Studies comparing arbitration and litigation reveal that arbitration is fair to individuals and businesses. Arbitration is cost-effective and reduces the time needed to resolve disputes*”.<sup>263</sup>

Some authors provide a more detailed and practical explanation as to why arbitration has become more expensive over time. Kenneth Rokinson QC speculates that it is mostly because those conducting international commercial arbitrations in the UK are members of the litigation department in London law firms. Lawyers in these firms and the counsel they brief are not specialists in arbitration and they ordinarily handle a mixed case load. Rokinson posits “[c]onsequently, arbitration, like litigation, has become too cumbersome and too expensive and has thereby failed to offer the commercial community an attractive alternative to litigation in the courts”.<sup>264</sup> With this in mind, he argues that “*arbitration has to change and has to rediscover its roots....Those involved in arbitration in London have to change their practices if they are to maintain the important position that London still enjoys*”.<sup>265</sup> Rokinson goes on to note that only in a few areas are arbitrations conducted comparatively quickly and cheaply. These include maritime arbitrations under the guise of the London Maritime Arbitrators Association,

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<sup>263</sup> National Arbitration Forum Report: Studies Compare Arbitration and Litigation, available at [www.arbitration-truth.com](http://www.arbitration-truth.com).

<sup>264</sup> Kenneth Rokinson QC, “Pastures New: Review of the Arbitration Act 1996”, in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*, Julian DM Lew and Loukas A Mistelis eds., note 45, at 213.

<sup>265</sup> *Ibid.*



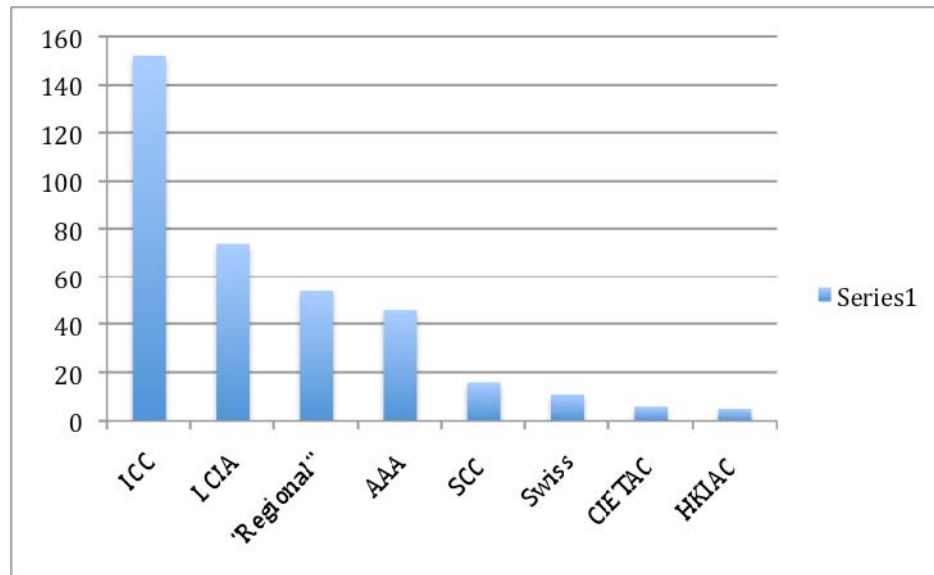
*“whose members still determine a large proportion of their cases on documents alone after informal submissions”*.<sup>266</sup>

Having regard to the relatively recent phenomenon that is institutional arbitration, Professor Mistelis indicates that 76% of the respondents in the survey preferred this form of arbitration over *ad hoc* arbitration. The reasons for the preference included (in rank order): reputation of arbitral institutions, familiarity, cost, convenience, advice from external counsel and review of awards, amongst others. Having established this preference, the investigation was extended to examine which were the preferred arbitral institutions. In so doing, a scoring system was devised which enabled respondents to give three points for a first choice, two points for a second choice and one point for a third choice. Sixty-six respondents in total were asked and the results are illustrated by the following chart:

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<sup>266</sup> *Ibid.*

## Preferred Arbitral Institution



It is very clear that the overwhelmingly preferred institution was that of the ICC with 41 of the 66 respondents ranking this as the most important institution. Professor Mistelis explains: “*A strongly perceived advantage of institutional arbitration is the cache behind the name of the institution. Whilst there are doubts as to the overall value of such cache, there is a widespread perception that ultimately being able to have an arbitration award issued under the name of a well-known institution is considered to be helpful.*”<sup>267</sup>

Statistical information gathered from the Queen Mary School of International Arbitration and the Singapore International Arbitration Centre illustrate the popularity of individual arbitral

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<sup>267</sup> *Ibid*, at 18.

institutions over the last eight years in terms of the number of cases administered. The following table displays these results.

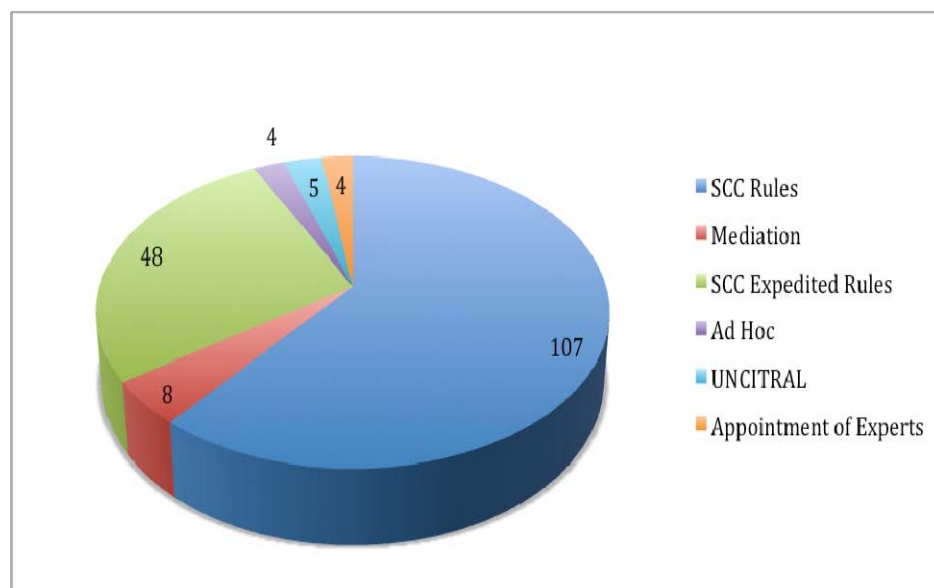
	2000	2001	2002	2003	2004	2005	2006	2007	2008
<b>ICC (France)</b> <i>(International and Domestic)</i>	541	566	593	580	561	521	593	599	663
<b>SIAC (Singapore)</b> <i>(International)</i>	41	44	38	35	48	45	65	70	71
<b>LCIA (UK)</b> <i>(International)</i>	87	71	88	104	87	118	133	137	213
<b>SCC (Sweden)</b> <i>(International and Domestic)</i>	66	68	50	77	45	53	64	81	74
<b>JCAA (Japan)</b> <i>(International)</i>	8	16	8	14	15	9	11	15	12
<b>AAA-ICDR (USA)</b> <i>(International)</i>	510	649	672	646	614	580	586	621	703

These results help in drawing some conclusions relevant to this inquiry. Taking two premises which are evident from the work considered - a preference for institutional arbitration and the relevance of reputation to the choice of arbitral institution – it is possible to reason that a system of arbitral regulation which is recognised the world-over and has achieved widespread success is sought-after. These indeed are the attributes of the UNCITRAL Model Law and as its reputation grows it will only

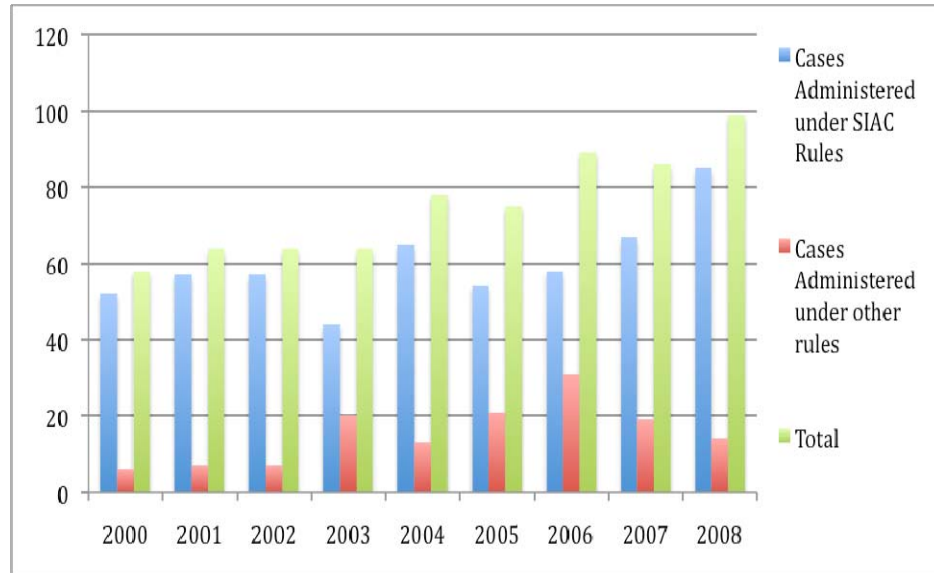
attract more parties to arbitrate in jurisdictions where it is implemented.

A number of arbitral institutions were willing to impart statistical information relating to the rules chosen by parties to proceedings. This enables some speculation to be drawn in relation to the nature of rule-system that parties to arbitral proceedings opt for. As will become evident from the empirical findings below, certain systems emerge as clear favourites given their specific attributes.

### Stockholm Chamber of Commerce



## Preferred Rules SIAC



The above charts illustrate that in the chosen arbitral institution, the rules of that institution are favoured to govern the procedure. This was to be expected as parties are likely to choose an institution on the basis of the reputation of their rule-system and other rules systems may be utilised in *ad hoc* arbitrations. The latter chart demonstrates a temporal increase in the choice of SIAC Rules and a decline in cases being administered under other rules. A number of institutions are strengthening their rule-systems as well as introducing tailored rule-systems to facilitate, for example, expedited procedures. This is evident in the rules offered by the SIAC, not least in that the institution has adopted three editions of rules over the last 8 years. Furthermore, the SIAC SGX-DT Arbitration Rules (2005) and the SIAC SGX-DC Arbitration Rules (2006) are designed

for the conduct of expedited arbitration for disputes arising from derivative trading and derivative clearing respectively. The SCC replaced its rules in 2007 and, in 2009, it will introduce new rules enabling parties to appoint an Emergency Arbitrator prior to the commencement of proceedings when urgent relief is required.

Such a rapid development in the rule-systems of arbitration institutions demonstrates a clear response to the demands of parties to arbitral proceedings. These new frameworks represent a head-on tackling of the issues which have begun to trouble arbitration – delay, cost and judicial intervention.

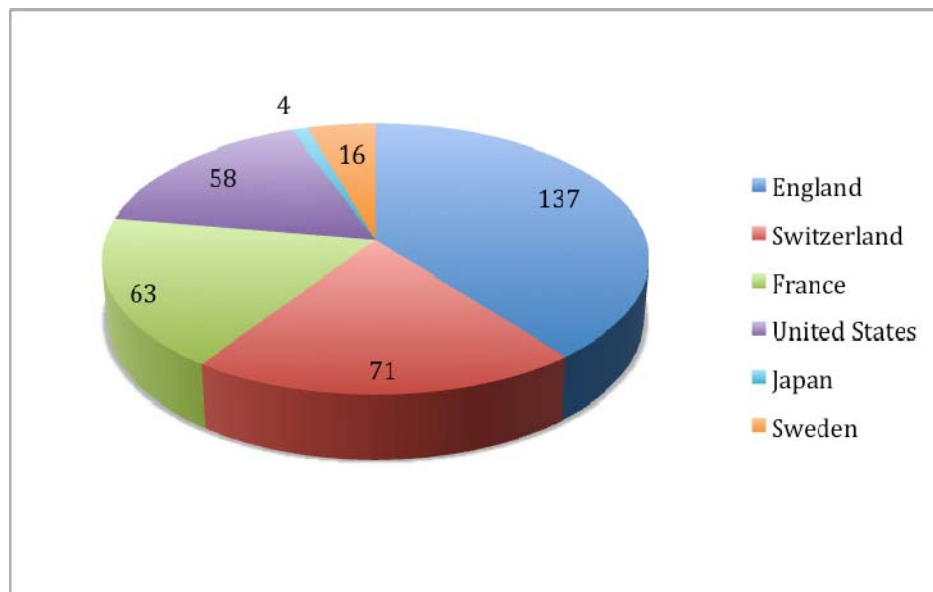
Some scholars and practitioners have doubted the importance often attached to the choice of the seat of arbitration.<sup>268</sup> Alternatively, it is suggested that such a choice is simply determined as a matter of convenience, not by the parties but by the arbitration institution they have selected or governed by the desire for neutrality and so the role of the arbitral tribunal is transitory and the seat has no necessary connection with the dispute. Professor Mistelis argues that there is no empirical support for this view, however.

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<sup>268</sup> Roy Goode, “The Role of the Lex Loci Arbitri in International Commercial Arbitration” 17 (2001) *Arbitration International* 19, at 24-29; see also Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, note 5.

Using the scoring system described above and the results of Professor Mistelis' survey of online respondents, it is possible to build up a picture of the preferred seats of arbitration:

### Preferred Venue of Arbitration



Other venues of arbitration mentioned by the respondents of the survey included Singapore, Italy, Nigeria, Cairo, Hong Kong, Australia, Greece, The Netherlands, Mexico, Austria, Belgium, Taiwan, Argentina and the United Arab Emirates.

The final aspect of Professor Mistelis' research examines the reasons for locating the seat of arbitration in any given place. These, as cited by the respondents, comprise legal considerations (36%), convenience (30%), neutrality (21%) and proximity (6%)

amongst others (7%). The conclusion to be drawn is that the future of arbitration is promising but corporations in the survey did identify a number of factors which need to be addressed, including cost, multiparty dispute capability and enforcement.

The following articulation by Dr Wetter summarises the findings above in concise manner and, further, offers an insight on the nature as well as the perception of the proceedings: “*London is the locale of the greatest number of international arbitrations in the world, yet the vast majority of these are viewed by counsel and the parties as wholly domestic in character in the sense that the proceedings are indistinguishable from those which take place between two English parties.*”<sup>269</sup>

A recent article in *The Lawyer* highlights that a conference in London (October 2008) was to hear that lawyers need to devise pioneering ways to ensure that London stays the forum of choice when it comes to arbitration.<sup>270</sup> The article goes on to explain that a panel member argues that London has: “*...a legal system that provides valuable certainty and reassurance in these uncertain times...London remains and will continue to remain one of the premier centres for international arbitration...This is despite the recent Attorney General’s recommendation in West Tankers [2007] that may lead to the end of English courts’ ability to grant anti-suit injunctions, and the*

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<sup>269</sup> Gillis Wetter, Choice of Law in International Arbitration Proceedings in Sweden, 2 (1986) *Arbitration International* 294, at 298.

<sup>270</sup> Nina Goswani, “Innovation can help London keep its lead in arbitration, say conference speakers” *The Lawyer* 20 Oct 2008.



*development of regional arbitration centres such as Singapore, Hong Kong and Dubai.”*<sup>271</sup>

However, the speaker was to argue at the conference, the article detailed, that there are key issues that need to be overcome. Particularly, the cost of arbitrating in London remains a significant challenge in an increasingly competitive international market. The article then details that the ICC is developing new initiatives to improve arbitration processes globally which potentially threaten London. More generally, these remarks serve to illustrate a growing sentiment reminiscent of the conclusions drawn by the Civil Justice Review in 1988 and Lord Woolf’s Access to Justice Report of 1996. At that time prior to the enactment of the Arbitration Act 1996, “...[t]here was a strong feeling that our arbitral system should take account of the needs and wishes of the commercial and trading community”.<sup>272</sup>

It is worth noting that within the international scene there are several emerging arbitral centres presenting a threat to London. This is the case, for instance, in respect of Ireland.

The Department of Justice, Equality and Law Reform in the Republic of Ireland published a new Arbitration Bill on the 9 June 2008, intended to repeal the three existing statutory sources

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<sup>271</sup> *Ibid.*

<sup>272</sup> Margaret Rutherford and John Sims, *The Arbitration Act 1996: A Practical Guide*, note 28, at 11.

of arbitration law in Ireland – the Arbitration Act 1954, the Arbitration Act 1980 and the Arbitration (International Commercial) Act 1998. The effect of a new Act will be to consolidate the existing legislation but also, significantly, to incorporate the provisions of the UNCITRAL Model Law into Irish arbitration law. At present, the Model Law does operate in Ireland but only applies to international commercial arbitration as is set out in the Arbitration (International Commercial) Act 1988. On the adoption of the new Act, the Attorney General of Ireland, Mr Paul Gallagher SC, has commented that one of the reasons the Bill arose was due to a “*desire for finality to be met*”. The Attorney General clarified that “[a] *system of appeals undermine the raison d’etre of arbitration*”.<sup>273</sup> The Arbitration Bill 2008 was expected to become law in Ireland during the latter stages of 2009 but due to other legislative priorities has been delayed indefinitely. In a recent newspaper report, it has been suggested that “*the Bill will make the Irish framework for [arbitration] identifiable to trade partners and compatible with international practice in this area*”. Furthermore, the author added simply that “*reforming the law will make it easier for businesses from abroad to trade [in Ireland]*”.<sup>274</sup>

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<sup>273</sup> Extracted from Preface of Dowling-Hussey and Derek Dunne, *Arbitration Law* (Roundhall Ltd, 2008), Comments by Attorney General Paul Gallagher SC at the ICC Arbitration Seminar held in Dublin on October 3, 2008.

<sup>274</sup> Barry O’Halloran interviewing Joe Kelly (Partner A&L Goodbody Law Firm, Dublin) “New Bill to Aid Exporters in Resolving Disputes with Overseas Partners” *Irish Times* 10 January 2010.

It is submitted that this move by Ireland – a jurisdiction which has had a similar legislative framework as regards arbitration to the UK – is significant. Not only does it represent a clear endorsement of the value which an UNCITRAL system offers in terms of harmonisation but more specifically, taking into consideration the comments of the Attorney General, it also signifies a rejection of a model which facilitates limited judicial intervention. The development is inevitably designed to attract parties to choose Dublin as their seat of arbitration and places this city on the arbitration map as a potential future arbitral hub.

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More than 53 countries have adopted the 1985 UNCITRAL Model Law in the last 20 years. Arbitration superpowers which have designed their own laws include the Chinese Law of 1994 (as amended), the French Code of Civil Procedure, the Swiss Private International Law Act 1987, the Swedish 1998 Arbitration Act and the USA's Federal Arbitration Act. It is possible to assert with confidence that arbitral regulation is increasing at an unprecedented rate, promoting arbitration in the respective jurisdictions in the process. The effect of this recent phenomenon is a growing number of jurisdictions with an adequate legislative framework from which potential parties to an arbitration may choose to locate their arbitral proceedings.

The advantage that these relative newcomers to the arbitral centre elite have is that they are able to learn from the experience in other jurisdictions and tailor their arbitration laws to meet the needs of today's commerce. In so doing, they are likely to attract parties who are increasingly footloose as regards their seat of arbitration. The consequences of this global phenomenon are positive for arbitration as it represents increasing competition in the market for arbitration as we move from the oligopoly of a few arbitral centres to the monopolistic competition model of many arbitral centres with a distinct brand. Hong-Lin perceives that. "...arbitration, unlike national court systems, is a commercially orientated product that flourishes on the basis of market forces. To avoid fading away, the popularity of this product depends on whether the demands of customers are satisfied. However, excessive interference exercised by state courts can result in the dissatisfaction of the customers."<sup>275</sup>

As a result of this shift, it is submitted that, in order to create a brand which appeals to parties, it will be necessary to ensure that it reflects the contemporary needs of the international commercial community. At present, the most pressing need appears to be that of reducing the cost of arbitral proceedings which, it is argued, will become even more acute in the present economic conditions if arbitration is to distinguish itself from

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<sup>275</sup> Hong-Lin Yu, "Five Years On: A Review of the English Arbitration Act 1996", 19(3) *Journal of International Arbitration* (2002), at 209

litigation. The Model Law presents two distinct advantages in this respect. First, it affords states the flexibility to tailor their individual legislative frameworks to meet these kinds of specific needs while retaining and anchoring the fundamental principles of arbitration in their respective jurisdictions. Second, the reputation of the Model Law as providing a harmonised system of arbitral procedure has an inherent value and states may draw upon this in the brand that they ‘sell’ to commercial parties. Clearly, Ireland has realised this inherent value.

## 5 CONCLUSIONS

The objective of this thesis has been to examine, evaluate and compare the legislative frameworks in which arbitration exists. Arbitration grew out of the need to settle disputes in an efficient and specialised manner, as an alternative to litigation. It is widely perceived to serve this purpose in contemporary dispute settlement and retains that pre-eminent status as the dispute resolution mechanism of choice in international commerce. This is the prism through which the present study has been conducted. Likewise, one should be mindful of arbitration's defining characteristics, particularly that of party autonomy. The latter is one of the theoretical foundations on which arbitration is based and constitutes an attractive feature for many parties. In short, arbitration is an effective method of settling commercial disputes, often in a tailored way, and its utility in this respect should be preserved and enhanced.

A charting of UK arbitration history reveals a rich and defined jurisprudence. Lord Justice Saville once described that “[w]e have highly developed rules and principles governing all aspects of arbitration, which is one of the reasons why this country has been and still is a world centre for arbitration”.<sup>276</sup> This, for many years, secured London's reputation as the world's leading arbitral hub. As other

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<sup>276</sup> Lord Justice Saville quoted in Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 6.

jurisdictions realised how fruitful arbitration business could be, however, London could not take this reputation for granted. As the adoption of the Model Law became increasingly widespread, the deficiencies in English arbitration law were exposed and calls for a systemic overhaul grew. “*London’s pre-eminence as a world arbitration centre began to be challenged. Foreign users were dissatisfied with such delays and high costs. They wanted less delay, less cost. They wanted their disputes resolved with certainty. The law was ripe for reform*”.<sup>277</sup>

The 1996 Act contributed many novel features to arbitration in England and, broadly speaking, academic commentary at the time of its enactment was supportive. Over a decade has passed since then and the arbitral landscape – as well as, more generally, the nature of commerce - has changed. That need to reform prior to the 1996 Act given “[t]here was a strong feeling that our arbitral system should take account of the needs and wishes of the commercial and trading community”<sup>278</sup> is apparent once more and renewed thinking is certainly required.

A critical analysis of the DAC Report in light of contemporary developments in international commercial arbitration has much normative value. Its influence on the proceeding development of UK arbitration law was profound and it is therefore important to consider whether the findings made in it are still relevant today. In particular, the importance of harmonisation with the

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<sup>277</sup> Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 5.

<sup>278</sup> *Ibid.*, at 10.

increasing globalisation of trade, was underestimated then and should be re-evaluated given the present importance of inward foreign investment. Beyond this, it is suggested that the level of analysis contained in the Report was far from detailed and often cursory in nature. Moreover, the categories used to group provisions of the UNCITRAL Model Law were inadequate and led to a number of pre-determined conclusions being made.

The objective and comparative analysis of certain key provisions of both the Arbitration Act 1996 and UNCITRAL Model Law was engaged in with a view to determining which offers the optimal legislative framework for arbitration to thrive as a method of settling disputes. The various strands of analysis may now be drawn together, summarised and concluded upon.

The examination of both legislative frameworks revealed that problems of definition with regard to arbitrability were prevalent. The scope of arbitrability remains textually undefined. Although an attempt has been made to sculpt the concept through the jurisprudence of the UK courts, there still exist many uncertainties. It is notable that UNCITRAL are making some inroads in the development of a universal definition of arbitrability but the effort remains in its infancy. Insofar as the Arbitration Act is concerned, this could be regarded as a lost opportunity on the part of the UK legislature to better the UNCITRAL Model Law in an area which is far more difficult to codify on an international plane than at the national level.



The concept of separability is now provided for by both legislative schemes. The 1996 Act placed the principle, developed at common law, on a legislative footing and, in doing so, brought UK statutory law into line with the UNCITRAL Model Law. The marrying of separability and competence under the Model Law results in a broader notion of the former. This is undoubtedly beneficial as far as arbitration is concerned. Nevertheless, it is submitted that these are conceptually distinct and should, as many commentators have advocated,<sup>279</sup> be treated under discrete provisions. Accordingly, the structure of the Arbitration Act offers greater theoretical coherence in this respect.

As to the competence issue is concerned, the enactment of the Arbitration Act marked the introduction of Kompetenz-Kompetenz onto the statute books of the English legal system. Also this effort represented an exercise in bringing UK law up to the benchmark set by many other jurisdictions around the world, including those which had adopted the Model Law. However, the provision is non-mandatory under the Act and parties may opt out of the provision where the parties agree to do so.

In addition to any disincentives which harbour in the 1996 Act, the recent case law of the ECJ should be noted and may serve to further disadvantage London as an arbitral centre. In effect, the

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<sup>279</sup> See, in particular, Fraser Davidson, "The New Arbitration Act – A Model Law?" (1997) *Journal of Business Law* 101.

decision in *West Tankers*<sup>280</sup> prevents UK courts from granting anti-suit injunctions, traditionally an attractive selling point of London, especially for parties to arbitration agreements.

Judicial intervention in arbitral proceedings may have two consequences for arbitration. First, it may serve as a way of supporting arbitration. Second, in contrast, it is a way of hindering the process and, in some instances, may undermine arbitral proceedings. In accordance with the Arbitration Act, a court may intervene before the commencement of an arbitration by extending time limits and having a discretion in the appointment of arbitrators. In the former case, the power of the court to extend the possible period in which parties may initiate arbitration represents an aspect of the Arbitration Act which is more detailed than the Model Law. The Model Law makes no provision for such. On the latter power to intervene both legislative frameworks provide for this. Textually, the provisions under both the Model Law and the UK Arbitration Act are similar in scope but it is submitted that the Model Law may permit a narrower possibility for intervention to rescue arbitral proceedings given the underlying philosophy of this legislative framework. This is an example of a situation in which restraining the courts may negatively impact arbitral proceedings. Rutherford and Sims point out that “[s]ometimes support is necessary,

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<sup>280</sup> *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* [2009] 1 All ER (Comm.) 435.

*for example if the machinery of appointment breaks down, or where it becomes necessary to remove an arbitrator” and further explain that “the philosophy of the Act may roughly be stated as: if the parties have chosen arbitration, arbitration they will have’. For the good of arbitration the court is given powers to assist the process and to exercise the minimum of supervision-and that is all’.*<sup>281</sup>

The power of the courts to stay legal proceedings is a feature of both the Arbitration Act and the UNCITRAL Model Law. However, under the latter a distinction is made between domestic and non-domestic arbitration agreements. In domestic agreements, a court may grant a stay unless it is satisfied that there are sufficient grounds for not requiring the parties to abide by the arbitration agreement. Despite DAC disapproval of the “sufficient grounds” refusal mechanism, it remains in the Act. Davidson characterises the terminology under this provision as deliberately vague and suggests that it is employed to cover the many and various instances where the courts have felt able to refuse a stay on legal proceedings.<sup>282</sup>

The inherent jurisdiction of the courts under the Arbitration Act 1996 remains one of the most controversial elements of the Statute. Lord Steyn noted that the English system “*involves greater*

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<sup>281</sup> Rutherford and Sims, *Arbitration Act 1996: A Practical Guide*, note 28, at 19 and 22.

<sup>282</sup> Fraser Davidson, “The New Arbitration Act – A Model Law?” (1997) *Journal of Business Law* 101.

*supervision of the arbitral process than is envisaged by the Model Law*".<sup>283</sup>

Which, considering his comments in respect of the Model Law – that it be the standard bearer for international arbitration legislation – appears to drive a horse and cart through the balance that the DAC attempted to strike in terms of judicial intervention under his stewardship. Other commentators have criticised the level of intervention permitted under the Act, arguing that specific aspects of the Act were unsatisfactory. Lord Hacking, for example, criticised the provision for review of awards in the Act, pointing out that “[u]nlike the UNCITRAL Model law, where there is no judicial review of arbitral awards, the parties under the 1996 Act must expressly agree to exclude judicial review. If not, the English Courts are entitled to judicially review arbitral awards”.<sup>284</sup> Crucially, inherent jurisdiction represents a licence for courts to intervene in arbitral proceedings outside of the express terms of the Arbitration Act. Having said this, the approach of the courts in their exercise of this power has been, to date, commendable in that they have not abused it to the detriment of arbitral proceedings. Thus, the attitude of suspicion that once bedevilled arbitral proceedings appears to have abated in as much as their conduct is now concerned.

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<sup>283</sup> Lord Steyn, “England’s Response to the UNCITRAL Model Law of Arbitration” in *Arbitration Insights, Twenty Years of the Annual Lecture of the School of International Arbitration*, Lew and Mistelis eds, note 45, at 135.

<sup>284</sup> Lord Hacking, “Arbitration Law Reform: The Influence of the UNCITRAL Model Law on the English Arbitration Act 1996”, 63(4) *Journal of the Chartered Institute of Arbitrators* (1997).

Court intervention after the arbitral proceedings may come in the form of challenge, enforcement or appeal of the award. This may be viewed as courts being able to undermine arbitral procedure and devalue the currency of an award. An appeal on a point of law under the Act is potentially very broad in scope. It is submitted, however, that an error of law should always be permitted. Arbitration must operate within the framework of the law and judges are eminently qualified to police the boundaries of arbitral law. UNCITRAL contains no general right of appeal on the question of a substantive error of law and therefore embodies a risk of injustice. Admittedly, the construction of such a provision is a delicate balance and it is necessary to take into account that, as Rokinson explains, “[i]t is probably true to say that the majority of those who include arbitration clauses in their contracts, and certainly those few who refer a specific dispute to ad hoc arbitration, do so because they do not wish their disputes and their commercial relationship to be referred to a national court, whether out of a desire for privacy or a fear for a suspicion of bias.”<sup>285</sup>

Wherever intervention occurs, the benefits of efficiency, economy and specialist dispute resolution are rendered, to a greater or lesser extent, redundant. Bearing in mind the level of court intervention which is permitted by the Act - despite a guiding philosophy to the contrary - perhaps it is useful to recall

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<sup>285</sup> Kenneth Rokinson QC, “Pastures New: Review of the Arbitration Act 1996”, in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*, Lew and Mistelis eds., note 45, at 214.

the fundamental issue that is at stake. Hacking utilised the following quote from the Chancellor in the famous Star Chamber of 1475<sup>286</sup> to warn of the potential dangers of the level of judicial supervision under the 1996 Act: *“This dispute is brought by an alien merchant...who has come to conduct his case here, and he ought not to be held to await trial by twelve men and other solemnities of the law of the land but ought to be able to sue here from hour to hour and day to day for the speed of merchants”*.

Although the objective and comparative analysis demonstrates the hypothesis abstractly, it should not be deductively concluded that this is the case in practice. Alternatively, the empirical inquiry provides illumination. In particular, it was found that importance is attached to reputation both in terms of the rule-system chosen to govern dispute settlement and, also, within the framework of institutional arbitration. As the UNCITRAL Model Law continues to be adopted the world over, this induces an inherent value by virtue of the perpetual harmonisation that transpires. Undoubtedly, this informs its reputation.

In Ireland, it is thought that adoption of a world-renowned legislative scheme will define that jurisdiction as arbitration-friendly and, more generally, improve trade. Similarly, brief reference should be made to Scotland – another jurisdiction

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<sup>286</sup> Lord Hacking, “Arbitration Law Reform: The Influence of the UNCITRAL Model Law on the English Arbitration Act 1996” 63(4) *Journal of the Chartered Institute of Arbitrators* (1997), at 2.

having much in common with England – which has recently enacted its own arbitral legislation.<sup>287</sup> Hew Dundas explains the Scottish approach: “[t]he solution of the Bill is twofold: first...the Bill includes all the provisions of the Model Law; second, the Bill gives the parties the option to apply the Model Law but not as a total alternative to the Bill, instead subject to the overriding safeguards in the Bill (many not given by, therefore adding to, the Model Law) which apply on a mandatory basis”.<sup>288</sup> In this way the Act embraces the Model Law while preserving valuable aspects of existing Scots law. While one swallow does not make a summer, the developments in Scotland, Ireland and elsewhere, as well as the efforts being made by arbitral institutions to attract parties, are evidence of a stronger international movement towards harmonisation and concerted resolve to answer the calls of the merchant.

Research suggests that the most common perceived disadvantage of arbitration is cost. This may be lower under UNCITRAL where there is likely to be less judicial intervention. As the traditional view of the UNCITRAL approach is “...focusing in legislative texts on fundamental rules of principle, providing an enabling statutory framework, and leaving the detail of ever-changing practices to sets of rules at the contractual level...”,<sup>289</sup> it provides a very

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<sup>287</sup> Arbitration (Scotland) Act 2009.

<sup>288</sup> Hew Dundas, “The Arbitration (Scotland) Act 2009: A Giant Leap for [Scots] Mankind”, 10(2) *Arbitration Law Monthly* (2009), at 4.

<sup>289</sup> Gerold Herrmann, “Does the World Need Additional Uniform Legislation on Arbitration?” in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*, Lew and Mistelis eds., note 45, at 226.

flexible and attractive option for states. With the principled skeletal framework that the UNCITRAL Model Law provides, jurisdictions may adopt it and tailor its provisions to suit the needs of the parties they are seeking to attract.

As arbitral centres become ubiquitous, the importance of meeting ‘consumer’ requirements and developing a brand in this market will become more acute. As a result, it is no longer sufficient for this arc of dispute settlement to simply bend towards party autonomy, procedural fairness and judicial restraint; all-round efficiency must also be part of the mix. Indeed, as one commentator has put it “**alone the 1996 Act will certainly not ensure that arbitration in London will continue to flourish**”.<sup>290</sup>

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<sup>290</sup> Kenneth Rokinson QC, “Pastures New: Review of the Arbitration Act 1996”, in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*, Lew and Mistelis eds., note 45, at 213.





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